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OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P.L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, and SAM BENNETT,
Petitioners,

v.

BILL CLINTON, Governor of Arkansas, W.J. MCCUEN, Secretary of State of Arkansas, THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS, THE DEMOCRATIC PARTY OF ARKANSAS, THE DEMOCRATIC STATE COMMITTEE, and THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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COURT OF APPEALS' OPINION UPON REHEARING EN BANC

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Appellants*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, the Phillips County Democratic Central Committee, and the Phillips County Republican Party Committee, *Appellees*.

No. 88-1953.

United States Court of Appeals,
Eighth Circuit.

Submitted April 10, 1990.

Decided May 4, 1990.

Appeal from the United States District Court for the Eastern District of Arkansas; G. Thomas Eisele, District Judge.

Carol Lani Guinier, Philadelphia, Pa., for appellants.

Tim Humphries, Little Rock, Ark., for appellees.

Before LAY, Chief Judge, BRIGHT, Senior Circuit Judge, MCMILLIAN, ARNOLD, JOHN R. GIBSON,

FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

PER CURIAM.

In this matter, a panel of this court, Judge Bright, dissenting, reversed the Judgment of the district court. Whitfield v. The Democratic Party, 890 F.2d 1423 (8th Cir. 1989). After rehearing en banc, the judgment is now affirmed by an equally divided court. Judges Bright, Arnold, Bowman, Wollman and Magill vote to affirm the district court. Chief Judge Lay and Judges McMillian, John R. Gibson, Fagg and Beam would reverse. The Clerk of the Court is directed to issue the mandate forthwith.

COURT OF APPEALS' PANEL OPINION

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Appellants*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, the Phillips County Democratic Central Committee, and the Phillips County Republican Party Committee, *Appellees*.

No. 88-1953.

United States Court of Appeals,
Eighth Circuit.

Submitted June 14, 1989.

Decided Dec. 7, 1989.

Carol Lani Guinier, Philadelphia, Pa., for appellants.

Tim Humphries, Little Rock, Ark., for appellees.

Before BEAM, Circuit Judge, BRIGHT, Senior Circuit Judge and HANSON,* District Judge.

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* The HONORABLE WILLIAM C. HANSON, Senior United States District Judge for the Northern District of Iowa, sitting by designation.

BEAM, Circuit Judge.

Whitfield and other appellants, black voters in Phillips County, Arkansas, challenge the district court's dismissal of their complaint. Whitfield sued the Democratic Party of Arkansas and others, alleging that a state statute which requires a general (runoff) primary election if one candidate does not receive a majority of the vote is both unconstitutional and in violation of section 2 et seq. of the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1982). We affirm in part and reverse in part.

I. BACKGROUND

A. Facts

The population of Arkansas is approximately 16.3 percent black. Approximately 47 of the 75 counties in Arkansas have black populations below this statewide percentage, and twenty-one counties are less than one percent black. Twenty-two counties have a black population over

twenty-five percent.

The state has a history of official discrimination in its electoral process. Arkansas has used racially discriminatory voting practices such as statutory restrictions on the rights of blacks to vote, discriminatory literacy tests, poll taxes, a "whites only" Democratic primary, segregated polling places, and at-large elections. Perkins v. City of West Helena, Arkansas, 675 F.2d 201, 211 (8th Cir.), aff'd mem., 459 U.S. 801, 103 S.Ct. 33, 74 L.Ed.2d 47 (1982). See also Smith v. Clinton, 687 F. Supp. 1310, 1317 (E.D. Ark.) (taking judicial notice of the history of electoral racial discrimination in Arkansas), aff'd mem., ___ U.S. ___, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988).

The focus here is not only on the State of Arkansas, but also on Phillips County. While over fifty percent of the residents of Phillips County are black, black residents of legal

voting age number less than fifty percent.[1] Statistics on education and income, indicators closely correlated with political participation, see Perkins, 675 F.2d at 211, reveal that blacks in Phillips County are on the average much less educated and far poorer than whites.

No black candidate has been nominated for or elected to a county-wide or city-wide office or to a state legislative position from Phillips County since the turn of the century. In the past two years, four black candidates have come in first in preferential primary elections in Phillips County, yet all four were subsequently unable to obtain the Democratic nomination because they were defeated by white candidates in general (runoff) primaries.

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[1] According to the 1980 census, Phillips County had 34,772 residents. Of these, 16,100 (46.30%) were white and 18,410 (52.94%) were black. However, of the 22,110 residents age 18 and over 11,542 (52.20%) were white and 10,395 (47.00%) were black. Earlier census figures show that these percentages are generally stable. Exhibit JX1 at 1-3, Whitfield v. Democratic Party, 686 F. Supp. 1365 (E.D. Ark. 1988).

Racially polarized (bloc) voting is the norm in Phillips County. Whitfield's expert, who performed both extreme case analyses and bivariate ecological regression analyses on the fifteen county-wide, city-wide, and state legislative elections since 1984, testified that in all fifteen elections, voting was racially polarized as shown by the fact that black candidates were supported by an average of over ninety-four percent of black voters and, in most county-wide races, virtually no white voters supported black candidates.

B. The Primary Election Runoff Requirement

The Arkansas Code sets forth the procedures for primary elections, Ark. Code Ann. §§ 7-7-201 to -311 (1987), pursuant to amendment 29 of the Arkansas Constitution. Amendment 29 states:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

Ark. Const. amend. 29, § 5 (emphasis added).

Whitfield is challenging section 7-7-202, which states:

> (a) Whenever any political party shall, by primary election, select party nominees as candidates at any general election for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election on the respective dates provided in § 7-7-203(a) and (b).
>
> (b) A General primary election shall not be held if there are no races where three (3) or more candidates qualify for the same office or position as provided in subsection (c) of this section, unless a general primary election is necessary to break a tie vote for the same office or position at the preferential primary.
>
> (c) If there are no races where three (3) or more candidates qualify for the same office or position, only the preferential primary election shall be held. If all nominations have been determined at the preferential primary election, or by withdrawal of candidates as provided in § 7-7-304(a) and (b), the general primary election shall not be held.

Ark. Code Ann. § 7-7-202 (1987).

Under the current system, candidates for a particular party nomination run in preferential party primary elections. If three or more candidates run in the preferential primary,

and none receives a majority of the votes, the top two candidates are required to run in a subsequent general (runoff) primary election. Both appellants and appellees acknowledge that, in Arkansas, the Democratic nomination is tantamount to election for most local and state offices.

C. The District Court Holding

The district court dismissed Whitfield's constitutional challenge to section 7-7-202 because the court found no racially discriminatory purpose or intent underlying the primary runoff enactments. The Court also rejected Whitfield's argument that the runoff had been maintained for racially discriminatory purposes. Whitfield, 686 F. Supp. at 1370.

The district court denied relief under the Voting Rights Act, stating that the plaintiffs failed to convince the court that section 2 applies to runoff provisions such as those found in section 7-7-202, given the demographics of the area and the manner in which the runoffs operate. The court also

concluded that, even if section 2 does apply, the plaintiffs failed to sustain their burden of proof that section 7-7-202 results in blacks having less opportunity than whites to participate in the political process or to elect candidates of their choice. Id. at 1387.

II. DISCUSSION

A. Constitutional Violation

Whitfield argues that section 7-7-202 was enacted and has been maintained with discriminatory intent and thus violates the Equal Protection Clause of the fourteenth amendment. "[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" Rogers v. Lodge, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (quoting Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976)). "The ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group

is whether the [voting scheme] under attack exists because it was intended to diminish or dilute the political efficacy of that group." Rogers, 458 U.S. at 621, 102 S.Ct. at 3277-78 (quoting Nevett v. Sides, 571 F.2d 209, 226 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed. 2d 807 (1980)).

A plaintiff challenging the constitutionality of a discriminatory electoral system must prove, by a preponderance of the evidence, that the defendant had racially motivated discriminatory intent in enacting or maintaining a voting practice. Perkins, 675 F.2d at 207; Nevett, 571 F.2d at 219. See also City of Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1549 (11th Cir. 1987), cert. denied sub nom. Duncan v. City of Carrollton, Georgia, Branch of the NAACP, ___ U.S. ___, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (citations omitted). The trial court must consider "the totality of the circumstances" surrounding the alleged

discriminatory practice in order to "determine whether the [challenged voting practice] was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect [candidates] of their choice." Perkins, 675 F.2d at 209. "Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is [the clearly erroneous standard]." Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Whitfield provided the following evidence of racially discriminatory purpose. First, in 1939, at the time the primary runoff statute was adopted in its original form, Arkansas was a one-party state and the Democratic white primary was the only election that mattered. At the same time, an amendment to repeal a poll tax, which effectively disenfranchised blacks, failed. Second, after the white

primary was held unconstitutional by the Supreme Court in the 1940s, the majority runoff system was retained to diminish black electoral influence. Third, the recodification of the Election Code in 1969 maintained the use of runoffs in primary elections. Fourth, in 1975 and 1983, attempts were made to also impose general election runoffs in response to the presence of black candidates in multi-candidate municipal contests. Finally, the current version of the statute was passed in 1983; two members of the legislature who served that year testified that the statute was intended to prevent blacks from winning further elections due to splits in the white community.

Based on a detailed review of the evidence surrounding the enactment of section 7-7-202 and the adoption of amendment 29 of the Arkansas Constitution, the district court held that Whitfield failed to establish his constitutional challenge to the Arkansas primary runoff requirement. Whitfield, 686 F. Supp. at 1374. The court noted that the

majority vote requirement set forth in the state constitution was initiated through petitions (not by the legislature) and adopted by a vote of the people of the State of Arkansas at a time when blacks in Arkansas could not vote in the Democratic primary. The requirement could not have been maintained by the General Assembly with discriminatory intent because nothing in the record indicates that the legislature had the power to repeal amendment 29. In fact, in 1940, the Arkansas legislature proposed an amendment to repeal amendment 29, but that effort was soundly defeated by the popular vote. Id. at 1371. The court determined that "the issue is beyond direct legislative reach" and thus concluded that the actual purpose behind the enactment of section 7-7-202 was the stated purpose "to insure that no one was nominated as a candidate of the Democratic Party who had not received a majority of the votes cast." Id. at 1370-71.

We agree that discriminatory legislative intent has not

been adequately established, given the time frame and political background of amendment 29. While the legislators may have enacted more recent statutes which continue to advocate primary runoffs, they were mandated to continue the use of runoffs by the state constitution and voter tendencies present in Arkansas. The district court's conclusion that discriminatory intent was not proved is not clearly erroneous. Thus, we affirm that portion of the district court opinion.

B. Violation of the Voting Rights Act

Section 2 of the Voting Rights Act provides:

> Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United

States to vote on account of race or color, * * * as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

1. Applicability of the Act

The Democratic Party urges us to affirm the district court's holding that section 2 of the Voting Rights Act does not apply to section 7-7-202. The Party notes that virtually all of the cases decided under section 2 deal with at-large elections or legislative districting matters. We conclude, however, that section 2 was not meant to apply only to cases challenging at-large election schemes and districting matters, although it is true that most of the previous section 2 cases concern these types of discriminatory voting practices.

The Senate Report emphasizes that section 2 is the "major statutory prohibition of all voting rights discrimination," prohibiting practices which "result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess. 30 reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207 (emphasis added). Nowhere in the language

of the statute did Congress limit the application of section 2 cases to those involving at-large elections or redistricting; in fact, the Senate Report specifically identifies "majority runoffs [which] prevent victories under a prior plurality system" as a "dilution scheme[] * * * employed to cancel the impact of the * * * black vote." Id. at 6, 1982 U.S. Code Cong. & Admin. News at 1983.[2]

The district court stressed that majority rule is one of the underlying concepts of our democratic system. However, we agree with the Fifth Circuit that "[t]he fact that majority vote requirements may be commonplace does not alter the fact that Congress clearly did conclude that such provisions could serve to * * * dilute the voting strength of minorities."

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[2] We recognize that this language in the Senate Report refers, in part, to section 5 of the Act which section deals with "preclearance" of changes in election laws in certain jurisdictions. Nonetheless, we believe this legislative discussion, which encompasses both special practices and general prohibitions clearly supports our analysis of congressional intent on the scope of section 2 of the Act.

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201, 1212 (5th Cir. 1989) (citing Thornburg v. Gingles, 478 U.S. 30, 56, 106 S.Ct. 2752, 2769, 92 L.Ed.2d 25 (1986)).

Furthermore, the Supreme Court has explicitly stated that "[s]ubsection 2(a) prohibits all States and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities." Gingles, 478 U.S. at 43, 106 S.Ct. at 2762 (emphasis in original). The Court has specifically recognized majority vote requirements as "potentially dilutive electoral devices." Id. at 56, 106 S.Ct. at 2769. Here, that potential has been realized.

The district court held, "as a matter of law, that the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state

of Arkansas as a violation of Section 2 of the 1965 Voting Rights Act, as amended." Whitfield, 686 F. Supp. at 1381. The court based this premise on "the circumstance that the voting age populations of blacks and whites in Phillips County is equal for practical purposes." Id. The court rejected the idea that "even where black voting populations equal or exceed white voting populations, blacks should nevertheless be considered a 'minority' because of the evidence that they have not participated in the past in the political processes of the county in as large a proportion as have whites." Id.

We disagree with the district court's analysis of this issue. The inquiry does not stop with bare statistics. Section 2 is not restricted to numerical minorities but is violated whenever the voting strength of a traditionally disadvantaged racial group is diluted. "[H]istorically disadvantaged minorities require more than a simple majority in a voting district in order to have * * * a practical opportunity to elect candidates of their choice." Smith v. Clinton, 687 F. Supp.

1361, 1362 (E.D. Ark.), aff'd mem., ___ U.S. ____, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988). We conclude, as a matter of law, that a numerical analysis of the voting age population in a particular geographic area does not automatically preclude application of section 2 to a challenged voting practice used in that area.

Furthermore, the parties stipulated to census figures showing that blacks do constitute a minority of the voting age population in Phillips County (47%). In addition, at every election studied by Whitfield's expert, blacks turned out at a lower rate than whites. Thus, although theoretically a black candidate may be able to muster a majority of the votes in Phillips County, the practical reality is that there simply are not enough blacks voting in each election to allow a victory for a black candidate.

While the district court believes that the registration level of voting age blacks is equal, or nearly equal, to that of voting age whites in some of the challenged geographic areas,

we find that conclusion to be speculative. Whitfield points out that the census data in the record contains no references whatsoever to registration rates, and indeed, Arkansas apparently does not keep such data by race. Appellants' Brief at 12 n. 12. The district court also supports its conclusion by relying on the fact that efforts to register blacks have greatly increased in recent years and black citizens no longer face harassment and intimidation in registering and voting. However, if we were also permitted to speculate, we would probably conclude that even with these changes in Arkansas politics, the voting statistics show that black registration numbers are still significantly lower than white voter levels. Blacks could not vote at all in the State of Arkansas until 1940, and as such blacks have had less than fifty years to increase their voter numbers. Their registration level could hardly be equal to that of the white community, which has been able to recruit and assemble voters since the creation of the state.

2. Discriminatory Results

The district court also concluded that, even if section 2 did apply to majority runoff requirements in Phillips County, Whitfield failed to prove that, based on a totality of the evidence, section 7-7-202 results in discrimination against blacks in Phillips County. We disagree.

Although the district court apparently recognized that "plaintiffs need not show "that the challenged voting practice or procedure was the product of purposeful discrimination," Whitfield, 686 F. Supp. at 1374, we believe the court failed to properly analyze the runoff requirement in light of the results-oriented test articulated in the Senate Report. Rather, it appears that the district court made a combined analysis of the discriminatory intent underlying section 7-7-202 and the cause and effect relationship between the runoff requirement and election results in Phillips County. This analysis circumvents the true issue: whether the challenged voting practice, a primary election runoff requirement, results in

blacks in Phillips County having less of an opportunity to participate in the political process and elect representatives of their choice.

Throughout the legislative history of the 1982 amendment to section 2, Congress emphasizes that a violation of this portion of the voting Rights Act may be ascertained through a results-oriented analysis. The Senate Report states that one of the objectives of the 1982 amendment was "to amend the language of Section 2 in order to clearly establish the standards intended by Congress for proving a violation of that section." S. Rep. No. 417 at 2, 1982 U.S. Code Cong. & Admin. News at 178. The Report then elaborates on this stated purpose:

> This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. * * * The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test * * *.

This new subsection provides that the issue to be decided under the results test is whether the political processes are equally open to minority voters. Id. at 2, 1982 U.S. Code Cong. & Admin. News at 179. The Report reiterates that the legal standard set forth by the amendment to section 2 does not require proof of discriminatory purpose and thus a minority plaintiff may establish a section 2 violation by showing that the challenged electoral practice results in denial of equal access to the political process. Id. at 15-17, 27, 1982 U.S. Code Cong. & Admin. News at 192-94, 205.

The Supreme Court has recognized Congress's intent to establish a results test, stating:

> The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations. First and foremost, the Report dispositively rejects the position of the plurality in Mobile v. Bolden, 446 U.S.

55 [100 S.Ct. 1490, 64 L.Ed.2d 47] (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters. The intent test was repudiated for three principal reasons--it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Gingles, 478 U.S. at 43-44, 106 S.Ct. at 2762-63 (quoting S. Rep. No. 417 at 2, 15-16, 27, 28, 36) (footnotes omitted).

Based on the clear language of the Senate Report and the Supreme Court's subsequent verification of the results

test, we reject the inferences made by the district court that Whitfield's failure to prove discriminatory intent under section 2 results in a dismissal of his claim. While proof of intent may be used to show a violation of section 2, S. Rep. No. 417 at 27 & n. 108, 1982 U.S. Code Cong. & Admin. News at 205, such proof is not required of a plaintiff under the statutory language.

The Gingles Court explained that "a court must assess the impact of the contested structure or practice on minority electoral opportunities" on the basis of the plaintiff's proof as to a variety of factors, as set forth in the Senate Report. Gingles, 478 U.S. at 44-45, 106 S.Ct. at 2763-64. "Typical factors" include (1) the extent of any history of official voting discrimination, (2) the extent of racially polarized voting, (3) the extent to which the state or political subdivision has used other voting practices or procedures which may enhance the opportunity for discrimination, (4) whether minority group members have been denied access to the candidate slating

process, (5) the extent to which minority group members suffer the effects of discrimination "in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," (6) whether political campaigning has been typified by racial appeals, and (7) the extent to which minority group members have been elected to public office. S. Rep. No. 417 at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07.

The district court reviewed the evidence presented by Whitfield as it related to the factors set forth in the Senate Report. For five of the seven factors, the court made factual findings which favored the conclusion that section 2 had been violated in Phillips County. Specifically, the court found that (1) Arkansas has a long history of racial discrimination which has touched the rights of blacks to participate in the democratic process; (2) Phillips County has experienced "extreme racial polarization in voting" in recent years; (3) other than majority vote requirements, Phillips County has not

used any other "discrimination-enhancing" voting practices in the recent past; (4) no evidence was submitted on this point; (5) Phillips County has experienced "devastating" effects of discrimination in the areas of education, employment, and health, because of "dire economic circumstances"; (6) although no evidence was presented of significant, overt or subtle racial appeals, race does play "a central role" in Phillips County politics and has "frequently dominated over qualifications and issues"; and (7) no black candidate has ever been elected to county-wide or state legislative office in Phillips County. Whitfield, 686 F. Supp. at 1383-85.

After adopting these findings, the district court reasoned that "the Senate Report factors more logically support proof relating to 'intent' issues than 'cause and effects' issues." Id. at 1382. However, this conclusion is contradicted by the language of the Senate Report. After noting that plaintiffs who choose to establish a section 2 violation on the basis of intent may do so through direct or

indirect circumstantial evidence, the Report states, "If the plaintiff proceeds under the 'results test,' then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay [sic] behind its adoption or maintenance." S. Rep. No. 417 at 27, 1982 U.S. Code Cong. & Admin. News at 205. Contrary to the district court's opinion, we conclude that the factors set forth by the Senate Report are to be used primarily as proof of a section 2 violation under the results test. See id. at 28, 1982 U.S. Code Cong. & Admin. News at 206.

The district court also held that Whitfield did not meet his burden of proof of showing a causal connection between the runoff requirement and the lack of minority electoral success. We again disagree. During the past four years, but for the runoff primary elections, four black candidates would have been the Democratic Party's nominee. The court infers that the actual cause of lack of success by black candidates

was the lack of motivation on the part of black voters--apathy--and if black voters would turn out at the polls in high numbers, their candidates would not be defeated because forty-seven percent of the voting population is black and some cross-over voting does occur. It seems to us, however, that these conclusions are based on two erroneous premises: (1) that plaintiffs must actually prove a causal link between the lack of black electoral success and the discriminatory system being implemented against them, and (2) as noted above, that the Senate factors do not apply to the cause and effect analysis.

We agree that a causal connection between the challenged practice, as it occurs within the political climate of the geographic area, and the diluted voting power of the minority must be established. Here, the proof is two-fold. First, the plaintiffs have proved that the majority vote requirement has impaired their ability to elect a candidate because blacks of voting age, although they are numerous in

Phillips County, fail to turn out at the polls in numbers sufficient to meet a majority vote requirement. Second, the plaintiffs have established, through proof of Senate factors, that the political climate of Phillips County has caused the low voter participation, because "[o]nce lower socio-economic status of blacks has been shown, there is no need to show the causal link of this lower status on political participation." United States v. Dallas County Comm'n, 739 F.2d 1529, 1537 (11th Cir. 1984). The Senate Report states:

> [D]isproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417 at 29 n. 114, 1982 U.S. Code Cong. & Admin. News at 207 (citations omitted).

The evidence adduced, the stipulated facts, and the district court opinion all confirm that blacks in Phillips

County suffer from less education, less employment, lower income levels, and disparate living conditions as compared to whites. Blacks also suffer from the remnants of official discrimination in Arkansas.

> [P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process[,] * * * may cause blacks to register or vote in lower numbers than whites * * * [and] may * * * lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.

United States v. Marengo County Comm'n, 731 F.2d 1546, 1567 (11th Cir.), appeal dismissed, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984).

Here, the district court required an improper burden of proof of causal relationships by holding, in effect, that the socioeconomic factors and the effects of discrimination did not hinder blacks' ability to participate in any legally significant way. See Dallas County Comm'n, 739 F.2d at 1537. "It is not necessary in any case that a minority prove such a causal link. Inequality of access is an inference which

flows from the existence of economic and educational inequalities." Id. (citations omitted). See also Marengo County Comm'n, 731 F.2d at 1569 (holding that "when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination, * * * the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else").

Furthermore, the district court improperly assumed that lack of motivation caused lower turnout at the Phillips County polls. See Gomez v. City of Watsonville, 863 F.2d 1407, 1416 (9th Cir. 1988) (stating that the district court should have focused only on actual voting patterns rather than speculating on reasons why minority voters were apathetic), cert. denied, ___ U.S. ___, 109 S.Ct. 1534, 103 L.Ed.2d 839 (1989); Dallas County Comm'n, 739 F.2d at 1536 (concluding that "[t]he existence of apathy is not a matter for

judicial notice"); Marengo County Comm'n, 731 F.2d at 1568-69 (noting that "[b]oth Congress and the courts have rejected efforts to blame reduced black participation on 'apathy'"). Also, the internal documents in this case simply do not support such an assumption. While, as the district court recognized, blacks are working strenuously in Phillips County to register black voters and to encourage black voter participation, voter turnout is still low. Yet, black turnout at some of the general primary (runoff) elections did not drop as significantly as did white voter turnout, when compared with the preceding preferential primary. These factors indicate to us that black voters are not apathetic. We believe that other factors contribute to a lack of political participation which nonparticipation is significant enough to make a runoff election victory an impossibility for a black candidate.

The plaintiffs presented statistical and expert evidence on the lower social, educational, and employment conditions in Phillips County. Contrary to the district court's

determination, we conclude that such evidence is relevant to prove cause and effect. Thus, without more, the plaintiffs adequately carried their burden of proof that the majority runoff requirement, as it operates in the political system of Phillips County, has caused blacks in that county to have less opportunity than whites to elect the candidate of their choice.[3]

The Senate Report states that the factors enumerated

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[3] Judge Hanson's research in this matter turns up a significant factor which none of the parties has addressed through evidence or in briefs or oral argument; that is, that Arkansas election law does not preclude cross-party voting in runoff (general) primary elections. It is factually uncontested that virtually no white voters support black candidates in Phillips County.

Thus, the Phillips County runoff system permits white Republicans, if they have a mind to do so, to, at least in limited circumstances, support a white Democrat in a runoff primary and to further dilute black voting strength. This cross-over factor distinguishes and attenuates the holding in Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985) since Butts clearly dealt with a closed (no cross-over) runoff primary. While we subscribe to Chief Judge Oakes' panel dissent, which opinion fully supports our results, we believe that the precedential value of the majority opinion in Butts is erased when the cross-over component is added to the factual mix.

"will often be the most relevant ones," though in certain cases other factors may also be used to show vote dilution. S. Rep. No. 417 at 29, 1982 U.S. Code Cong. & Admin. News at 207. Here, a majority of the factors have been found by the district court to exist in Phillips County. Furthermore, the findings relating to the third and fourth factors do not weigh against the plaintiffs' proof. However, the final determination "of whether the voting strength of minority voters is * * * 'canceled out'" demands the court's "overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case." Id. at 29 n. 118, 1982 U.S. Code Cong. & Admin. News at 207. We conclude that, based on the proof set forth by Whitfield and the totality of the circumstances in Phillips County, a section 2 violation has been established under the results test.[4]

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[4] Whitfield has also asserted the argument that the district court erroneously dismissed the plaintiffs' challenge to the general election majority vote requirement. Before trial, the district court dismissed plaintiffs' claim, citing as one of its reasons lack of standing. Whitfield asserts that plaintiffs

C. Remedy

We are well aware of the difficulty of fashioning a remedy for Phillips County alone, while allowing the other counties of Arkansas to continue implementing a majority vote runoff requirement for primary elections. However, the evidence requires just such a remedy, and courts have created remedial orders which affect only one legislative district, while affecting no other portion of the Arkansas state legislative structure. See Smith v. Clinton, 687 F. Supp. at 1311; Smith v. Clinton, 687 F. Supp. at 1362 (rejecting the argument that any plan affecting only a single legislative district would interfere with the state-wide scheme of apportionment).

Where, as here, a violation of the Voting Rights Act

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had standing because they are black citizens and registered voters. We disagree with this argument. We conclude that the challenge was properly dismissed because the plaintiffs lacked standing in that no black had ever participated as a candidate in an election covered by the general (multi-party) election runoff statute and they failed to allege that such elections have been discriminatory in Phillips County.

has been established, "courts should make an affirmative effort to fashion an appropriate remedy for that violation." Monroe v. City of Woodville, Mississippi, 819 F.2d 507, 511 n. 2 (5th Cir. 1987) (per curiam), cert. denied, 484 U.S. 1042, 108 S.Ct. 774, 98 L.Ed.2d 860 (1988). The legislative history of the Act states:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 417 at 31, 1982 U.S. Code Cong. & Admin. News at 208 (footnote omitted). In sum, "'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the

future.'" Ketchum v. Byrne, 740 F.2d 1398, 1412 (7th Cir. 1984) (quoting Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965)), cert. denied, sub nom. City Council v. Ketchum, 471 U.S. 1135, 105 S.Ct. 2673, 86 L.Ed.2d 692 (1985).

We agree with the Seventh Circuit that it is not the proper role of an appeals court to formulate its own remedial plan "or to dictate to a district court minute details of how such a plan should be devised." Ketchum, 740 F.2d at 1412. Therefore, we remand this case to the district court with directions to formulate an appropriate remedy for violation of the Voting Rights Act in Phillips County. We instruct the district court to limit its remedy to within the borders of Phillips County, since the evidence requires such a limitation.

We are well aware of the district court's concerns that elimination of the primary runoff requirement may not provide a total solution to the problem of the inability of black candidates to be elected in Phillips County and, indeed,

may perpetuate racially polarized voting there. However, the majority vote requirement has, up to this point, prevented blacks from electing the candidates of their choice, and so, the elimination of that requirement is mandated by section 2. While the duties of a district judge are multitudinous, accurately forecasting the future is not one of them. Legislators are responsible for the results stemming from their decision-making. Thus, these potential problems are for Congress, not the courts, to solve. If the remedy fashioned for Phillips County serves to intensify the problem, as the district court anticipates, then the Congress will have to reevaluate section 2 as it is applied to realistic voting situations and the realities of political life in America.

III. CONCLUSION

Section 2 was broadly written to protect minorities from disparate voting practices and procedures, including majority vote requirements. The Gingles Court stated that "[t]he essence of a § 2 claim is that a certain electoral law,

practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47, 106 S.Ct. at 2764. We determine that this definition encompasses the Phillips County situation.

Therefore, while we affirm the district court's conclusion that Whitfield failed to prove his constitutional claim, we reverse the court's conclusion that section 2 of the Voting Rights Act of 1965, as amended in 1982, is inapplicable. We conclude that section 2 is violated by the application of Ark. Code Ann. § 7-7-202 to Phillips County, Arkansas. Thus, we remand to the district court for determination of the appropriate remedy in accordance with the instructions set forth in this opinion.

HANSON, Senior District Judge, concurring.

I write separately to express my concern over the remedy that will be required by this ruling. Although we

have left the remedy unspecified, it will necessarily leave Phillips County, Arkansas, with a voting procedure that, at least temporarily, varies from that used in the rest of the state.[5] This is a situation which I believe courts should avoid whenever possible because the fragmentation of state law is a grave matter. There is, however, no way to avoid this situation in this case.

The Fourteenth and Fifteenth Amendments to the United States Constitution undeniably vest Congress and the Judiciary with the power to end any and all state voting procedures which abridge the rights of minority citizens to vote. City of Rome v. United States, 446 U.S. 156, 173-79, 100 S.Ct. 1548, 1559-63, 64 L.Ed.2d 119 (1979); South Carolina v. Katzenback, 383 U.S. 301, 323-27, 86 S.Ct. 803,

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[5] It appears that the district court may receive some guidance on the potential breadth of the remedy available in this case by the ultimate disposition of Spallone v. United States, 856 F.2d 444 (2nd Cir. 1988), cert. granted, ___ U.S. ___, 109 S. Ct. 3211, 106 L.Ed.2d 562 (1989) (argued Oct. 2, 1989).

815-18, 15 L.Ed.2d 769 (1965). Congress, acting within the authority granted by these provisions of our Constitution, has mandated that no state voting procedure can be allowed to stand which "results" in the dilution of the voting strength of a traditionally disadvantaged racial group in "any state" or "subdivision" thereof. See 42 U.S.C. § 1973 (1982). I am bound to follow this mandate.

In this case, a most able and fair district judge has found inequalities which indicate a violation of this law in Phillips County, Arkansas. There is no doubt in my mind, that under the present factual situation, the primary run-off requirement dilutes the votes of Phillips County blacks in a manner proscribed by the Voting Rights Act. Further, I am not prepared to accept as a major premise in syllogistic argument the premise, which I believe underlies Judge Bright's dissent, that there can be no injustice where majority vote rules.

I do not know that Congress, in its passage of the

1982 Amendments to the voting Rights Act and adoption of the "results" test, fully recognized that the statute as crafted would open the door to the fragmentation of state law when a statewide law is shown to result in a dilution of minority voting strength in only one subdivision of a state. I assume, however, that Congress did intend the natural consequences of its actions. If they did not, it is up to Congress to act pursuant to their wisdom to change the law--not this court. Thus, because the people of this country, through the Congress and the Constitution, have decreed that no state voting procedure can be allowed to stand which results in the dilution of the voting rights of racial minorities in a subdivision of a state, I join in striking down the application of the law at issue in Phillips County.

I harbor no illusions that this ruling enforcing the Voting Rights Act will dissolve the racial prejudice which continues to haunt Phillips County. There are problems in social and political human relations which defy solution by

legislative action. And, as noted by Justice Holmes, legislative efforts to solve these problems often create uncertainties over which judges, with all their frailties, labor. Racial problems, are now, and have been, one of these most difficult areas of concern. Thus, although I join in striking down the barrier in this case, it seems to me that such problems can only be truly "solved" by time, patience, and most importantly, education.

My study and research on this matter does not disclose a perfect precedent for that action which we take today.

BRIGHT, Senior Circuit Judge, concurring in part and dissenting in part.

I write separately to express my disagreement with the reasoning and conclusion of the majority regarding section 2 of the Voting Rights Act. This case presents a voting rights challenge to the use of run-off primaries in elections for single-member offices, a procedure that without more does not dilute the opportunity of any group of voters to participate

equally with other voters in the political processes leading to the nomination and election of public officials. Accordingly, I dissent.

Run-off primaries serve a basic principle of representative government: majority rule. States have always had the right to require that a majority of the voters support the winner of an election. While it is unquestionably true that run-off primaries combined with at-large elections or other dilutive electoral devices can produce discriminatory results, see Thornburg v. Gingles, 478 U.S. 30, 56, 106 S.Ct. 2752, 2769, 92 L.Ed.2d 25 (1986); City of Port Arthur v. United States, 459 U.S. 159, 167, 103 S.Ct. 530, 535, 74 L.Ed.2d 334 (1983); Rogers v. Lodge, 458 U.S. 613, 627, 102 S.Ct. 3272, 3280, 73 L.Ed.2d 1012 (1982); White v. Regester, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973), no federal court has ever taken the position that run-off primaries standing alone violate section 2. Moreover, the only court ever faced with this issue reached the opposite

conclusion. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986). Because of the importance of the principle underlying run-off primaries, their long history and the absence of authority for the position the court today adopts, I would require explicit direction from Congress before invalidating the use of run-off primaries standing alone.

Section 2 of the Voting Rights Act is less than explicit. It states that an electoral procedure violates the Act if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [minority voters] in that [minority voters] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (1982).

Section 2 forbids two types of electoral procedures: restrictive procedures that prevent members of a minority group from voting and procedures that have the effect of

diluting minority voting strength. Butts, 779 F.2d at 148. In this case we confront the issue whether the use of run-off primaries standing alone dilutes minority voting strength. This issue does not lend itself to easy analysis because the phrase "vote dilution" "suggests a norm with respect to which the fact of dilution may be ascertained." Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1012, 105 S.Ct. 416, 422-23, 83 L.Ed.2d 343 (1984) (Rehnquist, J., dissenting from summary affirmance). No such norm exists.

The Senate Report accompanying the 1982 amendments to the Act set forth a list of "typical" factors relevant to the existence of a section 2 violation. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. While the Supreme court discussed these factors with approval in Thornburg v. Gingles, the Court nevertheless observed

> that this list of typical factors is neither comprehensive

> nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, the Senate Committee observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other. Rather, the Committee determined that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality,'" and on a "functional" view of the political process.

478 U.S. at 45, 106 S.Ct. at 2763-64 (citing S. Rep. No. 417, 97th Cong. 2d Sess. 29, reprinted in U.S. Code Cong. & Admin. News at 206-07) (footnote and citations omitted). In this case, the majority does not conduct a searching evaluation but simply adds up a number of factors and concludes that a violation has occurred. Moreover, the majority fails to recognize that the district court conducted an appropriate evaluation.

In analyzing the effect of the run-off primary on the nomination of black candidates, District Judge Eisele quoted from the work of Professor Harold Stanley:

> The likelihood of black nominees gaining a plurality of the primary vote in a crowded field seems enticing enough to encourage some to argue for ending the runoff. However, in majority black districts--as supporters of the runoff point out--the lack of a runoff might cause several black candidates to split the black vote and allow a white candidate to gain a plurality nomination. Thus, the runoff can protect and promote black political prospects in majority black districts.

Whitfield v. Democratic Party, 686 F. Supp. 1365, 1378 (E.D. Ark. 1988) (quoting Stanley, Runoff Primaries and Black Political Influence, in Blacks in Southern Politics 259, 262-63 (1987)). Other commentators agree that invalidating the use of run-off primaries may hamper the ability of black voters to nominate their preferred representatives. McDonald, The Majority Vote Requirement: Its Use and Abuse in the South, 17 Urb. Law. 429, 437-38 (1985); Butler, The Majority Vote Requirement: The Case Against Its Wholesale Elimination, 17 Urb. Law. 441, 454 (1985). The able district judge cited evidence in the record to support his conclusion that the use of run-off primaries does not produce discriminatory effects: "The blacks have a voting

age population majority in some of the Justice of the Peace districts in Phillips County. If two or more blacks chose to run in the primary and only one white, then the same possibility, i.e., of a minority white plurality nominee, would occur." Whitfield, 686 F. Supp. at 1378. District Judge Eisele, residing in the state of Arkansas and familiar with its political processes, is in a far better position than we appellate judges to evaluate whether the run-off primary denies black voters an equal opportunity to nominate candidates of their choice.

Judge Eisele also reasoned that the existence of the run-off primary has the effect over time of easing racial polarization in voting. "[P]lurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built." Whitfield, 686 F. Supp. at 1386. In support of this statement, Judge Eisele observed:

> For Democratic candidates, nomination rules that encourage the seeking of biracial support, promote prospects for election. Retaining the runoff can lead to more black-white coalitions that [sic] back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization....

Id. at 1386 (quoting Stanley, Runoff Primaries and Black Political Influence, in Blacks in Southern Politics 259, 264 (1987)). Racial polarization needs discouragement not enhancement. We should avoid any conclusion, such as the one the majority reaches today, that has the effect of continuing racial polarization in voting.

In addition to failing to recognize that the determination of a section 2 violation depends on a searching evaluation of the political process, the majority opinion

MEMORANDUM OPINION OF THE DISTRICT COURT DISMISSING PETITIONERS' CHALLENGE TO THE PRIMARY RUNOFF STATUTE

Sam Whitfield, Jr., Linda Whitfield, P.L. Perkins, Julious McGruder, Georgia M. Varner, Annie Sykes, Ollie Jennings, and Sam Bennett, *Plaintiffs*.

v.

The Democratic Party of the State of Arkansas, the State of Arkansas Democratic Central Committee, and the Phillips County Democratic Central Committee, *Defendants*.

No. H-C-86-47.

United States District Court,
E.D. Arkansas, E.D.

May 20, 1988.

Olly Neal, Kathleen Bell, Marianna[;] Lani Guinier, Pamela S. Karlan, New York City, for plaintiffs.

Tim Humphries, Asst. Atty. Gen., Little Rock, Ark., for defendants.

MEMORANDUM OPINION

EISELE, Chief Judge.

This case involves a challenge to Ark. Code Ann. § 7-

7-202, which requires that a candidate receive a majority of the votes cast in a political party's primary election in order to obtain the nomination of that political party. That section provides in pertinent part:

> Whenever any political party shall, by primary election, select party nominees as candidates ... for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election on the respective dates provided in section 7-7-202(a) and (b).

Without spelling it out the plaintiffs are actually attacking Amendment 29, Section 5 of the Constitution of Arkansas (adopted November 8, 1938) which provides:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law shall be placed on the ballots of any election. (Emphasis Supplied)

The majority vote requirement is established by Amendment 29 and the mechanisms for carrying it out are set forth in section 7-7-202.

Plaintiffs are proceeding under two distinct theories. First, they contend that section 7-7-202 and Amendment 29 result in their being less able than white citizens to participate in the political process and elect the candidates of their choice. This cause of action arises, they state, entirely under section 2 et seq. of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq. See Plaintiffs' Pretrial Brief, p. 2. Secondly, plaintiffs allege that section 7-7-202 and Amendment 29 were enacted and have been maintained for racially discriminatory reasons and, therefore, violate the fourteenth and fifteenth Amendments to the Constitution. The Court will deal with the latter contention first, i.e., plaintiffs' "intent" claims.

Plaintiffs' Constitutional Claims

Plaintiffs rely upon the City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) and Rogers v. Lodge, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). Under this theory, plaintiffs must establish that

section 7-7-202 and Amendment 29 were enacted, or has been maintained, for a discriminatory purpose. As stated in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977):

> [D]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available."

In making this determination, the Court may consider the factors identified in the Senate Report along with all the other facts and circumstances. See infra discussion of section 2 of the Voting Rights Act of 1965. As the Court understands the law in this area, if legislation was motivated or maintained out of a desire to discriminate against blacks on account of their race and if, indeed, such legislation in fact has that effect, it would violate the Equal Protection clause. With these legal principles in mind, the Court will discuss the history of Amendment 29 and section 7-7-202.

contains a second flaw: none of the authority cited by the majority supports a conclusion that section 2 applies to run-off primaries standing alone. The majority refers to the Supreme Court's recognition that majority voting requirements are "potentially dilutive electoral devices...." Thornburg v. Gingles, 478 U.S. at 56, 106 S.Ct. at 2769. But the Court in Gingles was referring to the use of majority vote requirements in connection with multi-member districts. The majority also refers to language in Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1212 (5th Cir. 1989), that majority voting requirements "could serve to further dilute the voting strength of minorities." The Westwego court, however, was remanding to the district court for a determination of whether an at-large voting scheme diluted the voting strength of minorities in violation of section 2. The Westwego court was merely recognizing that a majority vote requirement combined with an at-large voting scheme could dilute minority voting strength. Finally, the

majority states that the Senate Report that accompanied the 1982 amendments identified a number of "dilution schemes," including "majority run-offs...." S. Rep. No. 417, 97th Cong. 2d Sess. 6, reprinted in 1982 U.S. Code Cong. & Admin. News at 183. The quoted portion of the Senate Report, however, is discussing section 5, dealing with pre-clearance of legislative efforts to undermine the Act. Section 5 is obviously not at issue here and the Arkansas legislature enacted the run-off primary law long before passage of the Voting Rights Act.

As stated earlier, the only court to address the use of run-off primaries reached a conclusion different from the one the majority reaches today. Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985). Butts involved a voting rights challenge to a New York statute that required a run-off primary if no candidate received more than 40% of the vote in the general primary. In holding that in the absence of dilutive electoral procedures the run-off primary at issue did

not violate section 2, the court stated:

> Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office. The distinction is implicit in City of Port Arthur v. United States, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982), where the Court struck down a run-off requirement that Port Arthur had appended to its at-large voting system for seats on the multi-member city council, but made no mention of a similar run-off requirement for the election of mayor. The latter run-off was not even challenged.
>
> ... The rule in elections for single-member offices has always been that the candidate with the most votes wins, and nothing in the Act alters this basic political principle. Nor does the Act prevent any governmental unit from deciding that the winner must have not merely a plurality of the votes, but an absolute majority (as where run-offs are required when no candidate in the initial vote secures a majority) or at least a substantial plurality, such as the 40% level required by § 6-162.

Id. at 148-49. The Butts rationale gives strong support to the district court's perceptive and well-reasoned opinion.[1]

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[1] Judge (now Chief Judge) Oakes dissented in Butts, contending that while minority voters have no right to "a proportionate 'share'" of a single member office, "they do have a right not to be subject to any structural process that

For all of the reasons given above, I would affirm.

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under the totality of circumstances deprives them of equal opportunity to field a candidate for one of those offices." 779 F.2d at 155 (Oakes, J., dissenting). Judge Oakes further opined that a run-off election after an open primary would not violate section 2. Id. (Oakes, J., dissenting). In footnote 3 of its opinion, the majority reveals that in this case Arkansas law does not prohibit cross-party voting. Thus, the Butts dissent seems not to support the opinion of the majority.

Arkansas has had such a majority-vote requirement since 1933. Prior to that time, at least two counties in Arkansas followed the practice without the benefit of any act of the Legislature.

In his inaugural address in January 1933, Governor Futrell stated, "nominations for public office should be made by a majority of the qualified electors voting at an election. By no means should an insubstantial minority be allowed to make a nomination." The bill was approved by the Senate by a vote of 28 to 0 on January 18, 1933, and passed the House by a vote of 84 to 3 on February 14. The Governor signed the bill and it became Act 38 of 1933.

Mr. Henry Alexander, in his article, "The Double Primary" in Volume 3 of the Arkansas Historical Orderly (1944) (cited by all parties and also by several of the witnesses) explained the overwhelming vote as follows:

> In view of the potent opposition in the legislature to earlier bills providing a double primary, passage of Act 38 with only three negative votes is difficult to

understand. The hectic Democratic primaries of 1932 may in some measure explain revival of agitation for the double primary system. The primary ballot of that year in Pulaski County, described as being "as long as your arm," contained seventy-six names exclusive of candidates for nomination to township offices and for election to party office. The ballot listed seven candidates for the gubernatorial nomination, a like number for the United States senatorial nomination. Six entrants sought the nomination for lieutenant governor and twenty candidates filed for seven other contested nominations to state office. Winners in several races failed to poll a majority of the votes case. J.M. Futrell, nominee for governor, polled less than forty-five per cent; Lee Cazort, nominee for lieutenant governor, less than thirty-one per cent. Converted to the principle of majority nominations by numerous minority nominations in the primaries of this and former years, a small group of influential citizens organized a Run-Off Primary Association. This short-lived organization was formed to advocate enactment of a double primary law at the 1933 session of the General Assembly. The organization, its headquarters in Little Rock, chose J. Bruce Streett, president, and Grady Forgy, secretary. Its officers had a hand in drafting Act 38 and its influence counted for much in obtaining passage of the statute.

During the 1935 legislative session, Act 38 was repealed. This prompted a movement to embody the majority-vote double primary system into the Arkansas Constitution where it would be beyond legislative power.

According to Mr. Alexander, in 1928, Mr. Brooks Hayes was runner-up in a seven-man race for the gubernatorial nomination which was won by Harvey Parnell with a plurality of less than 42%. Two years later, Mr. Hayes urged adoption of the double primary system in the form of an initiated amendment to the Constitution. Mr. Collins was at that time president of the Arkansas Bar Association. This effort culminated in the adoption of Amendment 29 to the Arkansas Constitution. The amendment covers a variety of "good government" election principles. For our purposes, the most important is found in Section 5, which reads:

> Only the names of candidates for office nominated by an organized political party at a convention of delegates, or by a majority of all the votes cast for candidates for the office in a primary election, or by petition of electors as provided by law, shall be placed on the ballots in any election.

As stated by Alexander:

> Sponsors of the proposed amendment were moved, primarily, by hostility to committee nominations and

> special elections and, secondarily, by hostility to plurality nominations. The latter, however, should not be minimized. The section of Amendment 29 requiring the double primary was included in earliest drafts of the proposal. Suggestions, at one time considered, to incorporate provision for a double primary in a separate amendment were discarded. Writing on August 31, 1937, Abe Collins stated, with reference to the section of the proposed amendment requiring the double primary, "I think it is the most important part of it (draft of Amendment 29)." Opposition to minority nominations was strengthened in some quarters when, in the primary of August 11, 1936, Carl E. Bailey won the gubernatorial nomination in a five-man race by a plurality of less than thirty-two percent of the votes cast.
>
> Amendment 29 was laboriously drafted during a period of almost a year by Abe Collins, Judge B.E. Isbell of DeQueen, and Doctor Robert A. Leflar of Fayetteville. C.T. Coleman of Little Rock and Doctor J.S. Waterman of Fayetteville cooperated.

Dr. Leflar and Dr. Waterman are recognized nationally as legal scholars.

Over 18,000 signatures were needed in order to initiate Amendment 29. The effort was successful. According to Mr. Alexander:

> The press of Arkansas vigorously and almost without exception supported ratification of Amendment 29 at

> the general election in November, 1938. No organized opposition appeared and, on November 8, the measure was approved by narrow margin of 63,414 to 56,947. Opposition to ratification was somewhat centered in so-called "machine" counties. In eleven counties often so characterized ratification was opposed by a popular majority of 61.5 per cent of votes cast in these counties.

Two temporary enabling acts were then passed.

In 1939, the Legislature proposed Amendment 30 to the Constitution which would have abolished the double primary. That proposal was defeated by a vote of 96,628 to 70,131, indicating, according to Alexander, a strengthening of public sentiment for the double primary system.

The first of the enabling acts under Amendment 29, Act 372 of 1939, required that uncontested nominations and nominations with only two contestants be voted on at the second primary. This provision was intended to lessen the opportunity for interference in the second race by winners or losers in the first, the preferential, race and to counteract lack of voter-interest and non-voting in the runoff primary. Since

Act 372 expired by its own terms, it was necessary for the 1941 session of the General Assembly to reenact such enabling legislation. This was done and became Act 90 of 1941. This act also expired by its own terms causing the enactment of permanent enabling legislation in 1943, to wit: Act 238 of 1943. Mr. Alexander's comments are pertinent:

> The double primary system in Arkansas has had a checkered and stormy history. Opposition to the system is outspoken and lacks neither leadership nor strength. This writer ventures to predict, however, that this opposition will grow weaker; that the principle of majority nominations will become more secure.
>
> Political parties in Arkansas in the state, district, county or city may nominate candidates either by party primary or by party convention. Optional use of the primary, authorized in 1895, was retained by authors of Amendment 29 to accommodate the Republican Party. Expense of a primary is unwarranted by the limited voting strength of the minority party. Optional use of the primary was retained also to allow Democratic nominations to be made by convention to fill vacancies in nominations and to select candidates to run in special elections. Direct nominations in these circumstances would not be feasible in all cases.
>
> Should a political party choose to nominate its candidates by primary such nominations, by provision of Amendment 29, must be made by majority vote.

> The wisdom of incorporating the mandate of majority nominations in the state's fundamental law, beyond reach of the General Assembly, is questionable. Objections stems from the likelihood that Arkansas may not remain a one-party state, as some authors of Amendment 29 tacitly assumed. Some profess to see national trends toward an alignment that may divide the electorate along political lines definitely liberal and conservative. Should this trend, or current frictions within ranks of the majority party in the southern states, usher in a two-party system in Arkansas, the constitutional requirement of majority nominations would invoke criticism. Meanwhile, the Republican Party, or any minority, is forced by Amendment 29 to select nominees either at party convention or to incur expense of two primaries.
>
> The principle of majority rule, on the other hand, is a bed-rock ingredient of democratic political philosophy. The principle, in one-party states, is ample support for the view that constitutional law should sanction majority nominations. The General Assembly may not amend the requirement of nomination by majority vote; in enabling acts it may exercise broad discretion in giving form and effect to the constitutional mandate.

Plaintiffs maintain, as pointed out above, that the primary runoff laws of Arkansas "were enacted and have been maintained for racially discriminatory reasons." Plaintiffs' Pretrial Brief, p. 2. Plaintiffs acknowledge, as they must, that during the period discussed above, when such laws came

into being in Arkansas, black citizens had already been essentially disenfranchised and removed from any participation in Democratic primaries. And, since nomination in Democratic primaries at that time was tantamount to election, blacks were essentially excluded from any meaningful participation in the entire political life of the state. "All white" primaries and the poll tax had reduced black voter registration, according to one authority, to 1.5 per cent in 1940. See, "Runoff Primaries and Black Political Influence," by Harold W. Stanley, p. 270.

The Court is convinced that there was no racially discriminatory purpose or intent in the primary runoff enactments. Nor could those laws at that time have had any discriminatory racial effect since blacks could not run for office, vote, or otherwise participate in Democratic primaries. But plaintiffs go on to argue that such laws have been maintained for racially discriminatory purposes. After hearing all of the evidence, the Court is convinced that this

is simply not so. The actual purpose was the stated purpose, to wit: to insure that no one was nominated as a candidate of the Democratic Party who had not received a majority of the votes cast. This is not a tenuous policy to conceal some racial animus but, rather, a "bedrock ingredient of democratic political philosophy." See discussion of Section 2 of the Civil Rights Act of 1965, infra.

Plaintiffs rely principally upon the circumstances surrounding the enactment in 1983 of Section 7-5-106, Ark. Stat. (1987) (which establishes the runoff requirement for candidates for municipal and county offices in general elections) as evidence of legislative intent to maintain the runoff requirement in primary elections for racially discriminatory reasons. They point out that this enactment followed directly upon the election of a black as mayor of West Memphis in a plurality election. Their reliance upon such evidence is misplaced for several reasons. First, that evidence falls far short of convincing the Court that the

overall legislative intent for the enactment of Section 7-5-106 was tainted by racially discriminatory motives. Second, the "nature of the beast" is quite different in the two cases: section 7-7-202 applies to party conducted primary elections across the board, that is, in all cases where a political party chooses to nominate by the use of that vehicle instead of by party conventions; section 7-5-106 applies to state-conducted general elections for two specific type of offices only, i.e., municipal and local offices. Section 7-7-202 deals with one of the methods political parties may use to determine who their nominees will be in the general election. Section 7-5-106 deals with the manner in which persons are elected to certain municipal and local offices. Different motives and intents obviously may come into play in these two differing situations.[1] Third, plaintiffs fail to accept that the majority

[1] In the hierarchy of the fundamental values of a democratic state, the manner in which political parties choose to identify their nominees for public office positions is not as important as the procedures used to control the actual election of such public officers. Using this reasoning, courts might

vote requirement in cases where primaries are used by political parties to nominate their candidates is embodied in the Constitution of the State of Arkansas.

Amendment 29 was adopted by vote of the people in 1938. That amendment, it should be recalled, was initiated by the people through petitions--not by the legislature. An effort to repeal it, Amendment 30 in 1940, as proposed by the Arkansas legislature, was resoundly defeated by the popular vote. So far as the Court is aware the issue has not been put to a popular vote since the defeat of Amendment 30. Therefore, the issue is beyond direct legislative reach. And

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feel less restraint in interfering with the nominating primary process than with the general election process. It is true that, in Arkansas, political parties are not required to use open primaries to determine their nominees. They may use the convention process. So ruling that a primary runoff law was bad would not be as threatening to the basic democratic structure of government as would a like ruling with respect to a general election runoff law. (Indeed, under our republican form of government, the concept of plurality rule for general elections might itself be suspect constitutionally.) But the significance is immense in either situation. And in one-party states, the primary elections may be the critical ones in determining who shall ultimately be elected.

the intent of the legislature is not in all cases the same as the intent of the people, as has been frequently demonstrated, and as was in fact demonstrated in this particular case when the legislature proposed Amendment 30 which, if enacted, would have abolished the runoff requirement in primary elections.

Indeed, it must be recalled that the repeal of the run-off statute in 1935 is what prompted the movement to embody the majority vote requirement in the Constitution where it would be beyond legislative control. And there is absolutely nothing in this record to suggest that the voters who caused the adoption of Amendment 29 and later rejected an amendment which would have repealed Amendment 29 had any racial animus in mind. The history is clear: race was not a factor. In fact, it has been suggested that fear of the power of the Ku Klux Klan may have been a motivating factor for some. But the perceived perversion of democratic principles (where plurality elections were permitted) was the overriding motivating factor.

Subsequent to the enactment of Amendment 29 and the failure of proposed Amendment 30 (to repeal Amendment 29), the people have had no further voting opportunity to reconsider the issue. So the majority vote runoff system in primary elections has been the settled practice in this state for over 50 years. The legislature, by its own actions, has no power to repeal Amendment 29. It cannot thus be contended that the General Assembly has retained or maintained the majority-vote runoff requirement for discriminatory reasons. And, although the legislature has recently endorsed the runoff principle for use in connection with certain general election contests, its motive, as discussed above, was not, overall, tainted by racial considerations. The fact that a handful of legislators, in 1983 may have been motivated by such considerations is beside the point. We are to deal with the overall legislative intent.

It is interesting to compare the evidence pertaining to legislative intent in this case with that in Butts v. City of New

York, 779 F.2d 141 (2d Cir. 1985). There, the runoff proposal opponents argued in the legislature that the proposal would have the effect of preventing blacks and Hispanics from ever electing their own candidates. And it was argued that the 40% threshold was chosen because it was just above the combined population of blacks and Hispanics. On the basis of such evidence and arguments, U.S. District Judge Brieant concluded that the act was passed for the purpose of diminishing minority participation in the political process. The Court of Appeals held that Judge Brieant's finding of discriminatory intent was clearly erroneous. A portion of the Circuit Court's analysis and reasoning is pertinent here:

> Judge Brieant placed particular emphasis on the remarks of two black Senators, Galiber and Stewart. Senator Galiber argued that the run-off bill would prevent a minority candidate from winning a city-wide election through a plurality and, consequently, from ever winning such an office. Senator Stewart opposed the law on the same grounds, arguing that the run-off was bound to degenerate into a race-based choice, and would thus extinguish the possibility of a black/Hispanic coalition candidate winning by plurality. He added that, in his view, the 40%

threshold had been chosen because the black and Hispanic combined population then comprised 30% of New York City, and thus the higher figure shielded the offices from a minority coalition candidate.

We find more persuasive the contrary evidence in the record provided by the remarks of the bill's proponents. First, responding to Senator Galiber, Senator Bloom stated that the purpose of the run-off was to bolster the weakening party system by ensuring that the candidate who emerged from the primary truly represented "the thinking of the majority." The court mistakenly characterized this statement as probative of racial motivation, interpreting the word "majority" to mean "racial majority." This is clearly not what Senator Bloom meant. His statements elsewhere in the debate clarify his view that the bill was not intended to and would not have the effect of weakening the voting power of racial--as opposed to ideological--minorities. Second, responding to Senator Stewart, Senator Brydges reiterated that the purpose of the bill was to ensure representation for the ideological majorities of political parties, and emphasized his opinion and hope that a minority candidate would one day profit from the run-off law.

The members of the Senate overwhelmingly passed the bill. The results in the Assembly--where the bill was virtually uncontested--were the same, with all 5 minority Assemblymen present voting in favor of the law. The district court, oddly, found this support, probative of racial animus in light of the evidence before the legislature that the law would be costly and logistically difficult to implement. The district court made no mention of the support that the bill received

from Senator Garcia (a Hispanic), and Garcia's statement during the debate that Badillo supported the bill, even though this evidence strongly undercuts the notion that § 6-162 was intended as an "anti-Badillo" measure. The court cited the "alacrity" with which the bill moved through the Assembly and Senate (two months), and Governor Rockefeller's quick approval, as somehow probative of the discriminatory intent behind the bill.

It is venerable principle that the legislature is presumed to act constitutionally. See, e.g., Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187, 191, 79 L.Ed. 281 (1934); Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 135-42 (1893). This rule was recently reaffirmed in Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), where the Court noted that courts should be "reluctant to attribute unconstitutional motives to the state, particularly where a plausible [constitutional] purpose may be discovered from the face of the statute." Id. at 394-95, 103 S.Ct. at 3066. Despite this, in analyzing § 6-162, the district court minimized evidence probative of the legitimacy of the law, and as a result drew all inferences against its constitutionality. The events leading up to passage of the bill clearly support an inference of legitimate motive. The Proccacino nomination badly hurt the Democratic Party in New York City, and such fluke results were likely to recur as the party system further deteriorated and a broader field of candidates emerged. The application of § 6-162 solely to citywide offices in New York speaks primarily to the ideological diversity within the City and the importance of those offices.

The 40% threshold, which Judge Brieant called "diabolic," was obviously chosen because Proccacino received 33% of the vote in 1969, not because of the minority population figures in New York. Finally, the speed with which the bill passed both houses demonstrates its broad-based support rather than any "nefarious" motives; this broad support is also evident from the strong minority legislative vote in favor of the bill.

At its core, the district court's holding seems to rest primarily on the statements in debate, of the bill's opponents. The Supreme Court has, however, repeatedly cautioned--in the analogous context of statutory construction--against placing too much emphasis on the contemporaneous views of a bill's opponents. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n. 24, 96 S.Ct. 1375, 1386 n. 24, 47 L.Ed.2d 668 (1976); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95, 71 S.Ct. 745, 750-51, 95 L.Ed. 1035 (1951). Rather, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." Schwegmann Bros., 341 U.S. at 394-95, 71 S.Ct. at 750-51; see N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964). And, in fact, the legislative debates surrounding § 6-162 are filled with lengthy speeches by the law's proponents attesting to its legitimate ideological purpose; there is not a single remark by any proponent of the legislation that so much as hints at any improper purpose. We conclude that the speculations and accusations of the run-off law's few opponents simply do not support an inference of the kind of racial animus discussed in, for example, Arlington Heights, supra, 429 U.S. at 265-

68, 97 S.Ct. at 563-65.

> Accordingly, we hold that the finding of discriminatory intent in the passage of § 6-162 is clearly erroneous. New York City's run-off law does not violate the Equal Protection Clause.

So here the Court must start with the presumption that the legislature acts properly and constitutionally. And it should be reluctant to attribute unconstitutional motives to the state, "particularly where plausible [constitutional] purpose may be discovered from the face of the statute." And we are cautioned against placing too much emphasis upon the contemporaneous views of the bill's opponents. Rather, we should look to the statements of the sponsors if the meaning or intent is in doubt. Following such guidance here, we can only conclude that the plaintiffs have completely failed in their attempt to show that the challenged primary runoff provisions were enacted or maintained for any racially discriminatory purpose.

The Court has already described the racial balance in

to Marianna in Lee County developed in the case of Campbell v. Lee County Election Commission and the census data in this record.

The Court finds that the black citizens of Phillips County do not still face harassment or intimidation in registering, or in voting, or in running for office. The location of polling places is always a difficult problem. Blacks on the average, being poorer and having less access to transportation, may be said to experience more difficulty on a statistical basis in getting to the polls. Of course, poor whites face the same problem. The Court does not find that the location of the polls as described in the evidence constitutes a significant barrier to black or white participation given even minimal motivation to so participate. The evidence indicates that the black leadership in this area is highly organized and motivated during the elections and does attempt to, and does, provide transportation for those blacks supporting that group's objectives who request such

assistance. See further discussion infra.

The laws relating to the assistance of persons at the polling booths have been liberalized. Although there has been some tightening up on the requirements for absentee voting, the objective has been to reduce the abuse of that mechanism which is in the interest of both blacks and whites who favor honest elections. As stated by Professor Stanley in "Runoff Primaries and Black Political Influences,"

> Absentee ballot abuse can reduce the chances for ousting incumbents.

It has occurred to the Court that the principal problem is one of education and communication. We are not dealing here with an at-large voting system or racial gerrymandering. So, where the black voting age population and the white voting age population are approximately equal and there are no legally significant state-imposed barriers to full participation, the question arises on the front end whether there can be any legal predicate for an attack, such as this,

the 75 Arkansas counties. Only 16 of those counties have black populations in excess of 30%. Statewide, the black population is 16%. One can see that in a great majority of the counties the thought or idea that a runoff mechanism might have racial significance or consequences would simply not occur to anyone. And likewise it would have no such significance to the legislators representing such counties.

The evidence in this case and the literature on the subject reveal that the absence of runoff requirements in the law has not generally come to the citizen's or legislator's attention until some bizarre result occurs in an election. Most often it has occurred when some candidate getting 30 to 40 percent of the vote has ended up "nominated" or "elected." See, e.g., the discussion of Mr. Henry Alexander's article, "The Double Primary," supra.[2] Whenever a person is elected

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[2] The Court views it as "sort of" like our attitude toward the Electoral College system. So long as the person elected usually or almost always has a majority of the popular vote, people do not get too agitated about that system.

by a plurality vote in this country, there appears to be a tendency for the citizenry, and their legislative representatives, to become agitated and concerned. This is understandable because Americans have traditionally been schooled in the notion of majority rule.[3] The theory is: a majority vote gives validation and credibility and invites acceptance; a plurality vote tends to lead to lack of acceptance and instability.

The concept of "majority-rule" dominates our national mind. But the problem is not confined to America. Many other democracies have had to deal with it. Recently, the French had a "run-off" election. The situation in South Korea appears to be that the present governing party did not get a majority of the votes in the most recent election. Their electoral rules are being challenged. Mr. Allende is said to

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[3] The framers of our Constitution, while acknowledging this principle, also understood that a majority could run roughshod over a minority. The Bill of Rights was their answer to the prospect of the tyranny of the majority.

have been the only Marxist who was ever elected the head of a democratic state. He received between 36 and 37 percent of the vote. A coup occurred. President Allende was murdered. Democracy has yet to return to Chile. Would a runoff requirement have preserved democracy there? One can only speculate. But the point is: there are compelling, obvious reasons, completely unrelated to race, for states to opt for runoff elections.

The plaintiffs, having failed to establish their constitutional challenges to the Arkansas primary runoff requirements, their claims in that regard will be dismissed.

PLAINTIFFS' CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965.

Section 1973, U.S.C. 42 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this

title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The quoted language reflects the 1982 amendment which Congress made to section 2 of the Voting Rights Act of 1965. By virtue of this amendment, Congress made it clear that plaintiffs need not show that the challenged voting practice or procedure was the product of purposeful discrimination. The Senate Report lists several "typical factors" that may serve to show a violation of the act. Those factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the

upon a primary runoff mechanism.

Indeed, it occurs to the Court that, absent state-created barriers to registering and voting, there should be both some low threshold, as well as some high threshold of minority voting age population needed in order to trigger a consideration of any argument that a runoff device results in a denial or an abridgement of the right of any citizen to vote or to participate in the political processes of the state. It could readily be argued that where the minority voting age population was below, say, 20 percent or above, say, 45 percent, the issue would simply be foreclosed as a matter of law. Indeed, this argument was alluded to by the defendants, Governor Bill Clinton and Secretary of State Bill McCuen, in support of their motion for summary judgment in this case. Those then-defendants argued that the plaintiffs' attempt "to invalidate the majority vote requirement for all elections in the state of Arkansas is unnecessary and improper." P. 4, Brief in Support of Motion for Summary Judgment. They

argued that the plaintiffs had presented no facts "which indicate that these requirements are discriminatory in statewide, congressional, district, or in county or local elections outside of Phillips County. They were, in effect, contending for a "low threshold" requirement. The Governor and Secretary of State argue:

> Many countries and municipalities in Arkansas are all or virtually all white. It is definitionally impossible to have any intent to discriminate against blacks in an election in an all white county or municipality. Likewise, with regard to state elections, it is definitionally impossible to assume a discriminatory intent or effect when only sixteen percent of the population, according to census statistics, is black. Even in a worse case scenario, under which there is absolute rigid and total racial block voting in State elections, eliminating the majority vote requirement would have no effect in helping blacks elect candidates of their choice because their portion of the population is simply too small.

And, as indicated above, when the voting age population of blacks approaches equality with the voting age population of whites and the evidence shows, in addition, a consistent pattern of "crossover" votes in actual elections, which,

members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practice or procedures that may enhance the opportunity for discrimination against the minority;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 177, 206, 207.

The most important U.S. Supreme Court case dealing with this issue is Thornburg v. Gingles, 478 U.S. 30, 34-37, 106 S.Ct. 2752, 2758-59, 92 L.Ed.2d 25, 37 (1986). That case involved a challenge to the use of multimember state legislative districts. In the context of that issue the Court held that the most important of the Senate Report factors were the "extent to which members of the minority group had been elected to public office in the jurisdiction" and the "extent to which voting in the elections in the state or political subdivision is racially polarized." Whether those factors would be emphasized in dealing with a challenge to a runoff requirement is doubtful. But Gingles does make it clear that in challenges under section 1973 the court should

conduct an intensely fact-specific appraisal. As stated in the plaintiffs' pretrial brief, "no court has yet developed a Gingles-like distillation for majority-vote cases." Plaintiffs' Pretrial Brief p. 5. Plaintiffs attempt to treat the runoff requirement as they would a "vote-dilution" case. And they maintain that all they need to show is that there is some causal relationship between the runoff requirement and the lack of "minority electoral success" and that voting in the challenged area is racially polarized. This Court does not agree. Plaintiffs must show a violation of Section 1973, i.e., that the runoff procedure was imposed or applied by the State of Arkansas in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color. But the Court agrees that plaintiffs must show, among other things, some causal connection between the runoff requirement and the lack of "minority electoral success." Their evidence has failed to so convince the Court.

The premise of this whole attack is that blacks form a

minority of the potential voters in Phillips County. The basic statistical data introduced into evidence may not support that assumption. Furthermore, at least since 1965, there have been no legal barriers to black participation in the political processes of the state. Nevertheless, the contention is made that because of the history of segregation and the socio-economic status of the blacks compared to whites in this area, it is, as a practical matter, more difficult for blacks to exercise their legal rights. More about that below.

The Court notes that in recent years there has been a much greater effort to register blacks. The county clerks in both Lee and Phillips Counties, for instance, have deputized many volunteers to assist in the registration efforts. The great bulk of these volunteers have been black and the great majority of those whom they have registered have been black. There is some evidence that the registration level of voting age blacks in some of the contested areas is equal to, or approaching, that of voting age whites. See statistics relating

although small percentagewise, are sufficient to "bridge the gap," the basic assumption used to challenge runoff provisions appears to be undermined. In this connection, the Court notes the language of the Court of Appeals in Perkins v. City of West Helena, 675 F.2d 201 (8th Cir. 1982), cited to this Court in plaintiffs' pretrial brief:

> [R]acial block voting prevails in West Helena. Almost without exception, black candidates have received more than 90% of the vote in the identifiable "black voting areas" and only 15 and 24 percent of the vote in "white voting areas."

p. 213. The evidence in this case likewise shows a consistent minimum "cross-over" vote. It is the Court's view that we do not have here the minimal disparities necessary to establish either whites or blacks as a "minority" of the voting age population. Those populations are for practical purposes equal.

Beyond the question of whether blacks in the instant case constitute a cohesive "minority" of the size necessary to trigger an inquiry into the question whether the primary

runoff law might discriminate against blacks, there is the further question of whether this particular election device, e.g., the primary runoff here, has a consistent effect of discriminating against the black minority. For the purpose of this discussion we might assume that the political unit involved has a voting age population of 60 percent white and 40 percent black.

Professor Harold W. Stanley has written persuasively on this issue. He cites the arguments made by the plaintiffs here:

> Without the runoff's majority vote requirement, black candidates in minority black districts could gain the Democratic nomination--drawing on solid black voting support, while two or more white candidates split the white vote. This would produce more black nominees, which would mean more black elected officials, because these black Democratic nominees should enjoy--thanks to the party label--sufficient general election support from Democratic whites for victory. When a sufficient share of whites back black candidates, these candidates can garner a majority of the vote for the nomination and the election. Critics contend that, when whites do not prove sufficiently willing to back black candidates, the runoff's majority vote requirement works against the nomination and--

thus--the election of blacks.

Professor Stanley then proceeds to address the logic and the practicality of the claims that runoffs disadvantage blacks. He states:

> [W]hether runoffs are racially discriminatory has yet to be determined. Firm evidence to address critical questions is lacking. . . .

Nevertheless, he concludes that the available evidence casts doubt on such claims. After citing the election of Doug Wilder as Virginia's Lt. Governor and the elections of Harold Washington as Mayor of Chicago, he observes:

> the levels of support that they secured in the general election--even if somewhat reduced--would have allowed them to succeed in a primary runoff.

He then makes the following analysis:

> For the South in general, if we assume that a plurality-win primary system would mean more blacks as Democratic nominees, we could not confidently anticipate the election of more black officials. The appeal of Republicans to white southerners, the reluctance of some southern whites to vote for black candidates, and the relative size of the black vote combine to check such predictions. Gone are the days of the solid South:

The Democratic nomination is no longer tantamount to election. Even for electoral contests between white candidates, Democratic whites voting for Republicans have characterized the recent South. Where electoral politics is racially charged, the added stimulus of race could make such defections even more common. In majority nonblack areas, a black Democratic nominee can count on facing a white Republican candidate in the general election; indeed, the prospect of a black Democratic nominee gives additional encouragement to Republican candidacies. The lack of white support that makes it difficult for a black to gain a majority in a Democratic runoff in a majority nonblack district would work to favor Republican prospects--resulting in the defeat of the black candidate. Making southern whites choose between race and party when their party ties have considerably loosened might accelerate the decline of the Democrats--and promote Republican prospects to an extent that Republicans themselves have not yet managed. More generally, the nomination of splinter candidates could make the Republican alternative more attractive in the eyes of many. "No question," U.S. Representative Wyche Fowler (D-Ga.) said, "the best thing that could happen to the Republicans is the abolition of the runoff primary. It would build the Republican party overnight."

Southern blacks are the most loyal Democratic group, but they are too few to ensure victories in most southern electoral constituencies. An exact count of the black population for each southern election district is not available; but the political import of the black population can be gleaned from the distribution of

> southern blacks in states, congressional districts, counties, and cities (Table 14.1). Most southern blacks live in electoral districts less than 30 percent black. The prospects for general election majorities based primarily on black votes are restricted to very few southern districts. The distribution of the southern black population indicates that the election of black or black-backed candidates in most of the South hinges on biracial coalition politics.

Having concluded that the elimination of the runoff requirement would not likely produce more black elected officials, he asked whether its removal would produce more nominees. His answer is as follows:

> The likelihood of black nominees gaining a plurality of the primary vote in a crowded field seems enticing enough to encourage some to argue for ending the runoff. However, in majority black districts--as supporters of the runoff point out--the lack of a runoff might cause several black candidates to split the black vote and allow a white candidate to gain a plurality nomination. Thus, the runoff can protect and promote black political prospects in majority black districts. For this reason, voting rights litigators who are working to dismantle at-large election systems and replace them with single-member districts (some districts being majority black) find the emphasis on ending the runoff to be misplaced. Recent reapportionments have reduced the number of multimember districts--making more districts majority black. After reapportionment produced an increase in

> single-member districts (several with black majorities) the chairman of South Carolina's House black caucus noted. "Things have changed so that the runoff now can work in our favor."

His logic is supported by the evidence in this case. The blacks have a voting age population majority in some of the Justice of the Peace districts in Phillips County. If two or more blacks chose to run in the primary and only one white, then the same possibility, i.e., of a minority white plurality nominee, would occur.

The Court shares the doubts of others that runoff requirements have any identifiable racially discriminatory effects. It is one thing for the plaintiffs, Mr. and Mrs. Whitfield, to point out that, after their first primary elections, they would have been the Democratic Party's candidates in the general election if they had not had to face a runoff; it is quite another thing to state that, had there been no runoff provisions when they ran in the primary, they would have been the Democratic candidates for the particular offices they

were seeking. Once you change the rules, then a different dynamic obtains which has been described by Mr. Stanley in his article, "Runoff Primaries and Black Political Influence," which is discussed above.

It goes without saying that runoffs are of no importance if only two candidates are in the race. Putting aside the remote possibility of a tie vote, in that situation, the winner must gain majority support. So a plurality election system, where racial voting and racial polarization exist, will result in attempts to limit the number of candidates on one's own side and, at the same time, to attempt to increase the number of candidates on the opposition side.

How thin a reed are plaintiffs relying on! Rationality is not involved. Only happenstance. The idea is: Maybe the black community can agree on one candidate and somehow prevent other black candidates from filing while the white community does not respond in kind and therefore ends up with two or more white candidates in the race. This is not a

political theory or philosophy; it is gamesmanship, political Russian roulette; and it is based solely on race. Note Professor Stanley's comments on the studies of Bradley Canon,

> Ending the runoff accomplishes little, if political forces then tend to restrict contests to two candidates. Experience with single primary and runoff systems in the South and the Border South indicates that runoffs encourage multiple candidacies in the first primary, but that single primary systems work to limit the number of candidacies to two. This difference has political, rather than racial, roots--although racial considerations can reinforce the tendencies. Bradley Canon examined gubernatorial primaries, runoffs, and nominations in 16 southern and border-south states between 1932 and 1977: He found that, in the 10 states with runoffs, the top two candidates averaged 67 percent of the first primary vote; but that, in 6 states with single primaries, the top two candidates averaged 93 percent of the vote. In a runoff system, several candidates can enter the first primary and strive to qualify for the runoff; should they fail in that quest, they can productively bargain with the first- or second-place finisher to deliver support in the runoff. Under a single primary system, such bargaining takes place before the primary, as interested parties seek to line up behind a winner. The single primary system's tendency to limit contests to two serious candidates--in conjunction with the pressures provided by racial polarization--make it likely that a black candidate for the nomination would face a single white candidate.

> This matchup would produce defeat for the black candidate in election districts that are not winnable by a black in a runoff.

There is nothing in the evidence which supports the contention that the plaintiffs here would have been the nominees of the Democratic Party in the general election had they run in a single, plurality-win primary. Had there been a single primary, plurality-win law in effect, and this was known to all before the fact, one can only speculate as to what would have happened.

In addressing the prospects for black candidates, Professor Stanley observes:

> The willingness of some Democratic white voters to back Republican candidates and the reluctance of some to vote for black candidates would turn the elimination of the runoff into a recipe for reducing black political influence. Those pushing for abolition of the runoff assume that such white voters are unfit to shape the future of the Democratic Party. Yet, insofar as political parties are organizations held together by a desire to win elections (rather than mount losing crusades) current voter attitudes need to be worked with--not assumed away. Southern black voters are loyal Democratic, however, basing the party on such a loyal but limited constituency does not promise

success at the polls. Few southern Democratic elected officials have gained office without a sizeable share of white votes; most Republican officeholders have gained office with very few black votes. Outside majority black districts, black votes as the only source of support are seldom sufficient for election, but without black votes some Democrats would have lost. (Not even Jimmy Carter, when he was elected president over Ford, gained a majority of the popular vote among white southerners.)

For Democratic candidates, nomination rules that encourage the seeking of biracial support promote prospects for election. Retaining the runoff can lead to more black-white coalitions that back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization, lower Democratic chances of succeeding in the general election; and an acceleration of the movement of southern whites into the Republican party, as white voters and politically ambitious whites find the GOP an increasingly attractive alternative.

It is clear to the Court that a runoff requirement encourages candidates to seek biracial support. The runoff

requirement almost mandates consensus-seeking collaboration between whites and blacks within the Democratic Party. The elimination of the runoff requirement would not, in the opinion of the Court, reduce racial polarization, but would tend to reinforce that polarization. Issues and qualifications would tend to take a back seat to race. And, once a "no runoff" rule was established, the game of foreclosing legitimate opposition in the interest of racial solidarity would thrive alongside of the stalking horse phenomenon.

Professor Stanley analyzes recent southern gubernatorial elections to measure electoral responsiveness to the interests of blacks. He concludes that such responsiveness best characterizes the "post-Voting Rights Act South." He analyzes the elections between 1954 and 1965 on the one hand and those between 1966 and 1973 on the other. The data indicates that the responsiveness to black interests increased dramatically in the later period, essentially reversing the earlier tendency. He notes that the success of certain

strong segregationists did not mark the path by which later gubernatorial candidates would succeed.

> The strong segregationist victor in Arkansas in 1966 lost to a racially progressive Rockefeller in the general election. The next victorious Democratic governor and his successors reflected the progressive Rockefeller.

Professor Stanley compared the gains made by blacks in southern states without the runoff and those with the runoffs:

> In southern states without the runoff during this period--Virginia since 1970, and Tennessee--gains in the number of black elected officials and the increased black political influence generally did not surpass the gains recorded by states with runoffs. Such a comparison suggests that, in recent years, the runoff has not diluted the strength of the black vote. (emphasis added)

In his conclusion, Professor Stanley again asks if the runoff is "racially discriminatory." And he concludes "that the runoff is not racially discriminatory." He observes that:

> Abolishing the runoff now would ultimately result in few (if any) additional black Democratic nominees, few (if any) additional black elected officials--and more Republican victories. Such an outcome would serve to exclude black voters from more winning

coalitions--thereby reducing black political influence.

He even observes that in recent years the evidence suggests that the runoff "has promoted black influences:"

> Maintaining and maximizing black political influence requires removing the remaining racially discriminatory barriers that blacks face. As reports have noted, some southern blacks still face harassment and intimidation in registering, voting, and running for office; uncooperative or even hostile registration and polling officials depress the black vote; black access to the polls is made more difficult by the location of polling places and the lack of effective assistance at the polls; restrictive registration practices also affect whites, but--given the legacy of past educational and economic discrimination--such practices have a greater impact on blacks, limited access for black candidates to the white community--particularly, civic organizations and sources of campaign funds--can reduce chances of election; absentee ballot abuse can reduce the chances for ousting incumbents; and racial gerrymandering can carve bleak constituencies for black electoral prospects. The runoff does not deserve inclusion among lists of the barriers that deny blacks an equal opportunity to participate in the political process and to elect representatives of their choice. Consequently, drawing attention to the runoff diverts attention from the real problems.

Without adopting the rationale in the Butts case (i.e., that section 2 does not apply to majority vote requirements

when the election at issue is for a single office), the Court nevertheless does have serious doubts whether the run-off provision (at issue here), in the factual context revealed by the evidence, could, as a matter of law, be deemed to be a device capable of making the political processes leading to nomination less open to participation by blacks than to others or capable of resulting in blacks having less opportunity than others to participate in the political process and to elect representatives of their choice. In Phillips County, the black population constitutes approximately 53 percent of the total, and the voting age population of blacks is only marginally less than that of the whites. In Lee County, the situation is similar but blacks appear to be marginally a majority of the voting age population of that county. Although there is evidence of extreme racial polarization in voting in recent years, there is almost invariably a minimal "cross-over" of blacks for white candidates and whites for black candidates. We have a situation, therefore, in which one cannot readily

figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of Section 2 of the 1965 Voting Rights Act, as amended.

Even assuming that the population figures were such as would permit the plaintiffs here to challenge the primary runoff law, they have not proved or demonstrated by the evidence that such a provision, based on the totality of the circumstances revealed by the evidence in this case, has had, or has, the effect of discriminating against blacks or that there is any causal connection between the lack of black electoral success and the challenged runoff procedure.

THE ROLE OF THE SENATE REPORT
TYPICAL FACTORS.

One must understand the function and importance of the Senate's factors. The factual determination which the Court is called upon to make under section 1973(a) is whether the challenged practice is being applied by the state or

political subdivision "in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color ... as provided in subsection (b)." Subsection (b) states that a violation of subsection (a) is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a class of citizens protected by subsection a ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Subsection (a) therefore sets forth the general operative factual issue and subsection (b) a particular showing that will establish a violation of subsection (a). The Senate Report then brings the Court's attention to certain "typical factors" that may serve to show a violation of the Act.

It should be noted that subsection (b) does not invade the judicial fact finding function by compelling a violation-

violation of subsection (b). By contrast, a positive finding with respect to the various "typical factors" listed in the Senate Report will not automatically control the ultimate factual findings.

During the oral argument of this case, the Court observed that the evidentiary record made by the plaintiffs here in their attack upon the primary runoff statute would have been practically the same if the plaintiffs had been attacking a "plurality-win" provision of state law, i.e., if they were asking the Court to mandate a runoff requirement. In other words, let us assume that the controversy arose as a result of the outcome of a primary election in those J.P. districts in Phillips County in which blacks constitute a large majority of the voting age population. Let us assume that one white ran against two blacks and received 40 percent of the vote, whereas each of the blacks received 30 percent of the vote. The argument could then be made that the plurality-win practice or procedure discriminated against blacks

because it permitted a white to win without obtaining a majority of all of the votes cast. But the evidence presented would be practically the same as that presented in this challenge to the runoff procedure, at least with respect to the Senate Report "typical factors." The evidence would be the same with respect to the history of official discrimination; the extent to which voting is racially polarized; the extent to which blacks presently bear the effects of discrimination in such areas as education, employment and health which hindered their ability to participate effectively in the political process; the extent in which blacks have been elected to public office, etc.

Or let us assume that the attack is upon the use of popular elections for the selection of party nominees. Under the Arkansas Constitution, party nominees may be chosen by party conventions. So what if the procedure being attacked was the use of elections? Again, the proof would be essentially the same as it was in this case as far as the Senate

speak of the blacks or the whites as being the "minority" or the "majority."

The case, Campbell, et al. v. Lee County Election Committee, (No. H-C-86-48), which is still before the Court, involved a plan of reapportionment to produce equal single member districts. The black plaintiffs argued that they would need a voting age population of 60 percent or more in order to have a "safe" black district and any real opportunity of electing the representatives of their choice. In the absence of demonstrated barriers to full political participation by blacks in the electoral process, the court characterized such an argument as a racial slur against blacks. The Court discussed that view with counsel in this case.

Because of the circumstance that the voting age populations of blacks and whites in Phillips County is equal for practical purposes, the Court assumes that the petitioners are contending that, even where black voting populations equal or exceed white voting populations, blacks should

nevertheless be considered a "minority" because of the evidence that they have not participated in the past in the political processes of the county in as large a proportion as have whites. Again, the Court rejects such a view, believing it to be both unwarranted, contrary to law, and counterproductive.

We have placed our faith in the "one person, one vote" rule. At great danger do we suggest that the votes of one group should be weighed heavier than the votes of another group. Even where a lower socio-economic status can be traced to a history of racial discrimination, i.e., where blacks in a particular area are not as well educated or as well-off economically as whites, because of a history of discrimination, as here, courts would do well to go slow and to resist the temptation to make up for such past wrongs by tampering with the fundamental principles of our electoral system. At least this Court will refuse to do so, and it will rule, as a matter of law, that the undisputed population

conclusion with respect to subsection (a) upon the basis of a "showing" that does not logically support such a conclusion. If subsection (a) had not included the words "or abridgement," the situation might be otherwise because a showing that, because of the challenged procedure, blacks have" less opportunity to participate in the political process" and "to elect representatives of their choice" might not rationally and logically support the conclusion that the challenged practice or procedure is being applied by the political subdivision "in a manner that results in a denial ... of the right of any citizen to vote on account of race or color." (Emphasis supplied). But, if made, the showing specified in subsection (b), and the natural inferences arising from such showing, can be said to rationally and logically support the conclusion that the challenged procedure results in an "abridgement" of the right of any citizen to vote on account of race or color. By contrast, it cannot be said that a positive finding with respect to some, or all, of the "typical

factors" referred to in the Senate Report would automatically require the conclusion that subsection (a) had been violated. The "typical factor" findings, and the inferences arising therefrom, simply may not logically and rationally tell us anything about the effect of the challenged procedure. The Senate Report factors more logically support proof relating to "intent" issues than "cause and effects" issues.

Nevertheless, although Congress may not intrude upon the judicial fact finding functions, it may properly suggest that the Court consider certain factors before reaching its decision. But no particular number of "positive" findings with respect to such "typical factors" can dictate the ultimate factual finding required under section 1973(a). So the Senate Report "typical factors" do not have the same function as the finding identified in subsection (b). Subsection (b) states that a violation of subsection (a) "is established if ... it is shown ... etc." (Emphasis supplied) So if the showing described in subsection (b) is made, that, in itself, will "establish" a

factors are concerned. And the same arguments could be advanced against the use of elections as plaintiffs have used here in attacking the runoffs procedure.

But the Senate factors have never been considered a "magic bullet" which can put in jeopardy any electoral procedure, including elections themselves. No, the Court must still deal with the ultimate factual issues identified in subsections 1973(a) and (b).

With these thoughts in mind, let us go through, one by one, the "typical factors" listed in the Senate Report in the light of the evidence presented in this case. The first is:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

Arkansas, as well as all other southern states (and probably all northern states), has a long history of racial discrimination. That discrimination touched the right of

blacks to register, to vote, or otherwise to participate in the democratic process. So factor #1 is practically a "given," at least with respect to any southern state or any political subdivision of any southern state. The only question would be: when did this "official discrimination" end in the voting rights area?

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

The Court finds that there has been extreme racial polarization in voting in Phillips County, Arkansas, in recent years. Indeed, depending on how one interprets "racial polarization," and relying on judicial notice, there appears to have been "racial polarization" in each of the primary elections in which the Reverend Jesse Jackson has run in this nation so far during this spring. Without exception, 90 percent plus of the blacks participating have supported his candidacy and the great majority of whites have supported white candidates.

Dr. Richard Engstrom testified concerning this subject. He analyzed each county-wide race in Phillips County in which both black and white candidates competed since the year 1984. He used two methods: (1) the "extreme case" (or homogeneous precinct) analysis and (2) bivariate ecological regression. He found that black voters have overwhelmingly supported black candidates while white voters have overwhelmingly voted for white candidates. In 10 of the 14 contests, he found that over 80 percent of the black voters voted for the black candidate. And in all 14, a clear majority of black voters preferred the black candidate. Conversely, in 8 of the 10 contests, he was able to analyze for "white precincts," less than 10 percent of the white voters voted for the black candidates and in the other two, less than 15 percent of the white voters voted for black candidates. These figures were derived from using the "extreme case" procedure. Using the weighted double racial regressions, Dr. Engstrom found polarization to be even more striking. It was his

opinion that in 11 of the 15 contests, over 90 percent of black voters preferred the black candidate and in the other 4, an overwhelming majority of black voters are estimated to have preferred the black candidate. At the same time, in 11 of the 15 contests, the regressions estimated that not a single white voter voted for the black candidate. In the other 4, whites' support was estimated at less than 10 percent.

The Court relies more heavily on the raw figures introduced into evidence. Based on all the evidence, the Court finds strong polarization in line with the factual statements made in the Court's opinion stated above. That is, despite the polarization, there was consistently a "cross-over" vote on each side sufficient to create the possibility of uncertainty in the outcome. So, on the basis of judicial notice and the evidence actually introduced, the plaintiffs have satisfied the Court that there is severe racial polarization in the elections in Phillips County.

3. The extent to which the state or political

subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority.

It is interesting to note that the U.S. Senate apparently has suggested that "majority" voting is a procedure that "may enhance the opportunity for discrimination." That is far from clear to the Court based upon the evidence and authorities it has reviewed. Nevertheless, yes, the state has imposed upon Phillips County the "majority vote requirement" in primary elections. The Court does not find that the county has, in the recent past, used any of the other "discrimination-enhancing" voting practices mentioned.

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

There was no evidence upon this point.

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in

the political process.

This is also a "given" for the state of Arkansas and Phillips County and probably for every other political subdivision in the nation. But the effects are more devastating in Phillips County than in other places because of the dire economic circumstances that have developed in that area of the state over the past decade. Although the Court is finding that blacks still bear the effects of discrimination in such areas as education, employment, and health, nevertheless, the Court also finds that those effects should not hinder their ability to participate effectively and equally in the political process. The Court also notes that typical factor #5 refers to the "ability to participate" rather than "opportunity" to participate as stated in the statute. The statutory language, not being ambiguous, controls. The effects of discrimination referred to do not, in any legally significant way, hinder the "opportunity" or, indeed, the ability of blacks to participate effectively in the political process.

Because there are no legal barriers remaining to the opportunity of blacks to participate in the electoral process, plaintiffs have naturally emphasized the "socio-economic" factors. Considering the nature of our nation's political and economic system, one must move with care in this area.

There are certain truisms about the participation of Americans in elections. It is said that the young, the poor, and the uneducated do not participate in the same proportions as the older citizens, the rich, or the well educated. These considerations are, by definition, race neutral. Although it may be that poor blacks, say, do not participate to the same degree as equally poor whites, the record is silent on this point.

Viewing from a larger perspective, the participation of qualified American citizens in elections is abysmally and disgracefully low compared with that of almost any other democratic nation on the face of the earth. So, regardless of age, regardless of economic status, regardless of education,

regardless of health, our performance, as rated, for instance, by the percentage of those who actually vote in presidential elections, is very poor. The other side of that coin is that we as a nation have not chosen to require or coerce participation or to penalize non-participation. Indeed, it is not clear that Congress has the power under our Constitution to mandate participation. In any event, it has not chosen to attempt to compel participation or to penalize non-participation.

Some argue that American citizens "vote" when they choose not to vote--that the failure to go to the polls is a rational expression of political choice. Although that might be true in a small number of cases, the Court suspects that the lack of education, awareness, and interest--or a feeling of estrangement, frustration, futility or ennui--are the more likely bases for non-participation.

The point is that there must be some minimum motivation, some personal goal, before a citizen will take the trouble to register, to learn about the issues and candidates at

hand, and to vote.

Plaintiffs have emphasized the disparity between the percentage of blacks as compared to whites who have telephones or automobiles. They point to data showing that in the Phillips County area, 30 percent of black homes have no telephone and 42 percent of black households have no automobile. And they can demonstrate that not having a telephone or an automobile makes it more difficult and less convenient for a citizen to qualify for, and to exercise, his or her voting rights. The tricky words are "difficult" and "inconvenient." So far, the state has left it to the political parties, their adherents, and those seeking nomination in partisan primary elections to motivate, to communicate with, and to assist those whom they wish to participate in such elections. The state, or political subdivision involved, has no role in this regard. And neither the Constitution nor the Voting Rights Act requires political parties to contact prospective individual voters, urge their participation, or

provide transportation for those potential voters. But the law does require the absence of legal barriers. It also requires that no procedure operate to deprive any citizen of the right to vote, or to deny to any citizen the equal opportunity to participate in the political processes of the community. But ordinary inconveniences such as one might experience if he wished to go to the doctor's office or to the post office or the general store should not be deemed to constitute legal barriers simply because the objective is to get to the voting place. The value one places on one's right to vote will be reflected in the difficulties and inconveniences overcome in exercising that right.

One of the few physical barriers which the plaintiffs emphasized in this case was the location of the polling places. The plaintiffs have suggested that many of the voting precincts could be located in places more convenient to the black voters. The use of black churches was suggested. There was no persuasive evidence that the polling places in

1987 in Phillips County were established to discourage voting by blacks. Mostly they appear to be established by inertia--the choices in one election being followed in the next. The low level of participation cannot be traced to this circumstance. This is not to say that improvement could not be made in this regard.

But let us assume for a moment that the location of the polling places in the primary elections in Phillips County did have the effect of making it more difficult for blacks than whites to participate in the political processes. What does that tell us about the effect of runoff elections? Nothing. If the culprit is the practice or manner of locating polling places, should not that, then, be the practice that is attacked?

6. Whether political campaigns have been characterized by overt or subtle racial appeals.

In their Pre-Trial Brief, plaintiffs state: "While recent campaigns in Phillips County have not been characterized by overt racial appeals, plaintiffs will present evidence of the

central role race plays in Phillips County politics." The Court does not find evidence of significant, overt or subtle racial appeals, but accepts that those participating in the electoral process in Phillips County in recent years have more or less come to accept race as playing a central role in that county's politics. This is not to assess responsibility for that unhealthy situation, but race has frequently dominated over qualifications and issues. It is the Court's belief and hope that this is a transient phenomenon on the road to a more rational approach to political participation.

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

No black candidate has been elected to any county-wide office or to any state legislative office from Phillips County. One black candidate has been elected to office from a predominantly white jurisdiction in a head-to-head race. Within the county, blacks have won several Justice of the Peace elections (a county legislative office) in single member

district contests.

The Senate Report, in addition to the seven typical factors, mentions two additional factors, to wit:

> Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

There was not much evidence pertaining to the responsiveness on the part of elected officials "to the particularized needs" of blacks. The Court has already noted the comments of Mr. Stanley on the great increase in such responsiveness in recent years based upon his study of southern gubernatorial contests.

Finally we come to whether the policy underlying the state's use of the runoff requirement is "tenuous."

The plaintiffs point out that only ten states have majority-vote requirements and most of them are in the south. Although plaintiffs acknowledge, as they must, the history of

the primary runoff requirement, they state that Arkansas did not seek to impose a majority-vote requirement in general elections until 1969, "during a period of growing black activity." Their claim is that this first attempt, and subsequent attempts which culminated in 1983 with the passage of section 7-5-106, were in part "responses to the perception that a plurality-win system allowed black voters to exercise significant influence in the political process at the state level and provided them with a realistic opportunity to elect black candidates at the local level." See plaintiff's Pretrial Brief, p. 14. As pointed out in the discussion above, the plaintiffs' evidence simply does not establish that which is asserted in the brief.

We are dealing here with the very heart of our political system.

What are the policies underlying the primary run-off laws and Amendment 29 to the Arkansas Constitution? It must be assumed that the Democrats who overwhelmingly

controlled the state General Assembly (our legislature) in the past, and still do today, believe their party should adhere to certain principles. Majority-rule is one of those principles. And that principle has had overwhelming, popular support when it has been on the ballot in Arkansas. But equally important are the reasons stated by Professor Stanley which we repeat here:

> For Democratic candidates, nomination rules that encourage the seeking of biracial support promote prospects for election. Retaining the runoff can lead to more black-white coalitions that back Democratic candidates who make successful biracial appeals. Courting and composing such biracial coalitions require a politics that is capable of reducing racial polarization, rather than reinforcing it. Such political cooperation between the races provides a more promising basis for collaboration on the eventual nomination and election of southern black candidates. On the other hand, eliminating the runoff where strong racial polarization exists--even if this would produce more black nominees (which seems unlikely)--should mean continued racial polarization, lower Democratic chances of succeeding in the general election; and an acceleration of the movement of southern whites into the Republican party, as white voters and politically ambitious whites find the GOP an increasingly attractive alternative.

Each party has an objective of breaking down harmful divisions among its supporters. The evidence suggests that plurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built.

Everyone involved in this lawsuit agrees that racial polarization in voting, i.e., voting for someone simply because of his or her race, is bad. Everyone agrees that we look forward to the day when the qualifications of the candidates, their principles, programs and policies and their positions on the issues will dominate political debate.

The Court looks on the current malaise in Phillips County as a temporary phenomenon that will, over a relative short time, pass. The Court is convinced that the elimination of the run-off would tend to perpetuate racial polarization and bloc-voting. The existence of the run-off provision has the opposite tendency. The state and party policy behind the

primary run-off laws is, therefore not tenuous but, to the contrary, strong, laudable, reasonable and fair to all.

Having reviewed the Senate Report factors and some of the proof relating thereto, the Court must determine whether its positive findings with respect to many of those factors make it more probably true than not true that the challenged run-off provision makes the political processes not "equally open to participation" by blacks in that blacks have "less opportunity than whites to participate in the political process and to elect representatives of their choice."

It should be apparent by now that most of the positive findings with respect to the Senate Report factors have no tendency to prove, or disprove, that proposition. The truth is that focusing on some of those factors serves more as a distraction than a useful tool for evaluating the cause and effect operation of the challenged runoff laws.

CONCLUSIONS

This Court is not denying plaintiffs relief because it

hopes and believes that the normal democratic processes of give and take will, over time, move Phillips County and the other Delta counties beyond "race politics," although that, indeed, is its hope and belief. It is denying plaintiffs relief because they have failed to establish either the constitutional claim or their statutory claim. They have failed to prove that the primary runoff laws of the state of Arkansas were enacted or maintained for any racially discriminatory purpose, and they have failed to convince the Court that Section 2 applies to such runoff provisions given the demographics of the area and the manner in which runoffs operate. And, finally, assuming Section 2 would apply to runoffs in such circumstances, the proof does not sustain plaintiffs' contention that the challenged provisions result in plaintiffs' and other blacks' having less opportunity than white citizens to participate in the political process or to elect candidates of their choice. Their complaint will, therefore, be dismissed.

ORDER DISMISSING THE GOVERNOR AND SECRETARY OF STATE AS DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, *et al.*,	:	
Plaintiffs,	:	
v.	:	Case No. H-C-86-47
Honorable Bill Clinton, *et al.*,	:	
Defendants.	:	

ORDER

Pursuant to the telephone conferences on March 1, 1988 and March 4, 1988 the Court rules as follows:

1. The plaintiffs' claim challenging the Arkansas general election statute, Ark. Code Ann. §7-5-106 is dismissed due to plaintiff's failure to join the Phillips County Election Commission, an indispensable party.

2. That the defendant class of county boards of

election commissioners of which the Phillips County Board of Election Commissioners was representative, will be decertified.

3. That the motion for summary judgment filed by separate defendants, Governor Bill Clinton and Secretary of State McCuen, is granted on the ground that they are not necessary parties and that no claim of wrongdoing has appropriately been asserted against those defendants. Accordingly, those defendants are dismissed.

4. That defendant Phillips County Democratic Committee and the Phillips County Republican Committee be, and they are hereby, appointed as the named representatives on behalf of the following defendants' class: all political parties' county committees in the State of Arkansas.

5. That the named defendants in this action are: The Democratic Party of the State of Arkansas, The

State of Arkansas Democratic Central Committee, The Phillips County Democratic Central Committee, and the Phillips County Republican Committee. As stated above, the Phillips County Democratic Committee and the Phillips County Republican Committee are appointed as the named representatives on behalf of all political parties' county committees in the State of Arkansas.

6. That Mr. Tim Humphries will continue as counsel for the above defendants.

It is so ORDERED this 4th day of March, 1988.

/S/
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 59 and/or 79(a) on 3/7/88 bw

RELEVANT PORTIONS OF THE DISTRICT COURT'S ORAL RULINGS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, et al.,	:	
	:	
Plaintiffs,	:	No. H-C-86-47
	:	
v.	:	Little Rock, Arkansas
	:	March 4, 1988
Bill Clinton, et al.,	:	9:00 A.M.
	:	
Defendants.	:	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE G. THOMAS EISELE,
United States District Court

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PROCEEDINGS

* * * * *

THE COURT: We are back in touch. The plaintiffs, of course, were asking the Court to reconsider its ruling on the standing or ripeness with respect to their proposed challenge to the general election run-off law and we have looked at some of the cases and I have had some second thoughts about it. But I note that even if I were to reverse my view on that, as far as just standing or ripeness is concerned, the necessary parties to raise that particular issue are not before the Court if I'm right in my statement which I previously made that the file does not reflect that the

Phillips County Board of Election Commissioners was ever served, nor has it ever entered its appearance or filed any response voluntarily in this case.

So, we have essentially the Democratic party and the Republican party people who are necessary of course to challenge the primary run-off statute. But we do not have the appropriate or proper or necessary parties, it seems to me, to challenge the general election run-off.

Furthermore, again I get back to this question of standing and ripeness, and I indicated that I felt that the two run-off situations seem so entirely different. The primary run-off -- the primaries are conducted to nominate people. General elections are conducted to elect people. You would not have a run-off in the general election unless you had an independent party running. In other words, you would have a Democrat and a Republican. If you had those two, there couldn't be a run-off unless there was a tie, or if you had only the Democratic nominee of course there could be no run-

off, or if you had the Democrat and an independent there would be no run-off.

MS. KARLAN: Your Honor, the municipal elections are non-partisan. The municipal elections are covered by the general election run-off statute, so it wouldn't be the case ever that you would have a person running under the Democratic label or under the Republican label. Everyone runs as an independent.

THE COURT: And they don't file in the primaries at all.

MS. KARLAN: No, Your Honor.

THE COURT: They just file for the general election.

MS. KARLAN: Yes, Your Honor.

THE COURT: Which office are you talking about?

MS. KARLAN: Mayor of Helena, alderman; elections such as those. There's no party nomination system so there are often multiple candidates in the municipal general election because there's no prior device for screening.

THE COURT: I see. That that's not going to be a situation -- in other words, they are not going to go through the primary situation at all. It's just going to be whoever -- what do they have to do?

MR. NEAL: By petition, Your Honor.

THE COURT: A certain number of petitions?

MR. NEAL: Certain number of signatures on the petitions.

THE COURT: Well, then that particular type of run-off could occur and probably, I guess, maybe will occur frequently. I'm not sure. Let me ask you, though, on the more general proposition. Take the other offices, non-municipal offices. Has there ever been a run-off under the 1983 statute for a non-municipal office? Does anyone know?

MR. HUMPHRIES: For a county office, Your Honor? I'm not aware of one. We have looked at that a little bit and I'm just not aware of one.

THE COURT: I gather there's never been a run-off

situation in Phillips County at any rate for a non-city --

MR. HUMPHRIES: Not for county elections.

THE COURT: Has there ever been one for a city election?

MS. KARLAN: Yes, Your Honor.

THE COURT: In Phillips County?

MS. KARLAN: Yes, Your Honor, there were two in the 1986 general election.

THE COURT: Okay. Just for the record, those offices were what?

MS. KARLAN: Mayor and municipal judge.

THE COURT: Okay. Well, I have the problem of looking at these, as I believe, different issues and I have the further problem of necessary parties. What's your answer [sic] to that? You know, having the Democratic party and the Republican party before the Court is not a basis, it seems to me, to challenge general election run-off statutes. And I'm not sure that even if the other problems were out of the way

that we could go forward under the circumstances that we see here.

MS. KARLAN: Well, initially, Your Honor, although Mr. Humphries has made the argument that the role of the Secretary of State and the Governor in issuing the commissions is purely ministerial, if they are issuing commissions even in a ministerial capacity in a way that's not in accordance with federal law, then the supremacy clause would permit you to enjoin them. So I think this suit could have been brought without any service on the election commission at all because the Governor and the Secretary of State must act in a particular way in order for those people to take office.

THE COURT: Well, I'm inclined to disagree. You've got to serve the people, it seems to me, who are charged with the duty of conducting the election you are challenging or to effectuate the statute that you are challenging. The Governor as such and the Secretary of State

as such are not those people.

MS. BELL: We are talking about Bankston Waters and Judge John L. Anderson. In other words, Your Honor, it's my understanding that the chairman of the election commission was served.

THE COURT: That's because he is head of the Democratic party.

MS. GUINIER: He was served and one of the other members of the election commission was served, and then the Governor appoints the third person and the Governor was served.

THE COURT: Well, nobody is really taking the view, are you, that you have the Phillips County Board of Election Commissioners served in this case?

MS. GUINIER: Your Honor, we are taking that position.

MS. BELL: The People [sic] who are the Phillips County Election Commission have, in fact, been served.

THE COURT: If you sue the Democratic party and the Republican party and serve the chairman of those two parties, you have served two of the county board members -- members of the County Board of Election Commissioners, but you are not suing them as members of the County Board of Election Commissioners. You got service on them because of their roles as head of the party; the parties being the ones that conduct primary elections.

Well, I just think it's much too risky and there is no reason to do it. We ought to have the proper people before the Court to defend the general election statute, and so I'm going to stay with my ruling both on the grounds of essentially having no concrete case, lack of ripeness, but more particularly I think at this stage we just don't have the proper party before us and I don't think we can make do by the methods suggested, various people served in various capacities. But if you are going [sic] to sue the County Board of Election Commissioners, I think you should have taken the

trouble to serve that board as such, and all the service papers, as I see it, are in the file and you can look and see what you have done in that respect. But I don't see that you have.

I don't know that that's going to change anything in terms of what we are going to be facing on next week during the trial. I don't know that it will shorten it or not -- probably will not -- [sic] but I do think it will give us a clear focus upon what is to be determined and the evidence which is pertinent to that determination.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

Sam Whitfield, et al.,	:	
	:	No. H-C-86-47
Plaintiffs,	:	Little Rock, Arkansas
	:	March 1, 1988
v.	:	3:00 P.M.
	:	
Bill Clinton, et al.,	:	
	:	
Defendants.	:	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE G. THOMAS EISELE,
United States District Court

APPEARANCES:

For the
Plaintiffs: OLLY NEAL, JR.,ESQ.
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PROCEEDINGS

THE COURT: All right, folks, can you hear me?

MR. HUMPHRIES: Yes, Your Honor.

THE COURT: Let me go through the list. Tim, you are there for the defendants.

Mr. Olly Neal?

MR. NEAL: Yes, sir.

THE COURT: And Ms. Pam Karlan?

MS. GUINIER: She's here.

THE COURT: And Lani Guinier?

MS. GUINIER: I'm here.

THE COURT: All right. There are quite a few things we need to deal with on this phone conference. We

have the court reporter. I'm going to go over the rulings that I think are appropriate and then discuss the various outstanding issues. It may be that another hearing or another conference might be necessary before the trial. If so, it might be conducted Friday. Perhaps it won't be necessary.

Let me take up first a problem which I just noticed as I reviewed the file yesterday. It's been mentioned to you by my law clerk, I think, and is a matter that has concerned me. The original complaint alleges that Sam Whitfield, Jr. ran as a candidate for the office of county judge of Phillips County in the Democratic primary of May 27, 1986. Linda Whitfield alleges that she was a candidate for the office of circuit clerk of Phillips County in the same Democratic primary. According to the complaint, Sam Whitfield received 34.6 percent of the vote leading a field of three candidates, the other two of whom were white. Mrs. Linda Whitfield alleges that she received 36.8 percent of the vote leading the field of four candidates which included three whites. Both

erroneously alleged that they were forced into a run-off by virtue of the provisions of Section 3-616 of the Arkansas Statutes. They claimed that this majority run-off requirement was established by the Arkansas Legislature in 1983. They alleged that the Act was passed with haste as a result of the outcry of the white majority over the election of a black mayor in a city in Arkansas. Their complaint stated that prior to the election of the black mayor, the "run-off statute was viewed as unnecessary by the white-dominated legislature of the State of Arkansas." They therefore challenged the 1983 Act codified as Section 3-616 of the Arkansas Statutes.

A motion to dismiss was filed challenging the standing of the plaintiffs on the ground that the run-off election was not held pursuant to Section 3-616. The defendants pointed out that Section 3-616 applied only to general elections concerning county or municipal offices and had nothing to do with run-offs in primary elections. The defendants did acknowledge that there is a run-off requirement for primary

elections. That requirement is found in Section 3-110, being Act 465 of 1969. They stated that the primary run-off statute of 1969 carried forward the run-off requirement established by earlier acts of the legislature, going back apparently to the early 1930's. And if I read the briefs right, I gather that those early enactments just simply kept in effect what was the run-off requirement that had been established prior to that time by Democratic party rules. The defendants therefore asserted that the plaintiffs have no standing to challenge Section 3-616 since neither suffered injury as a result of the application of that statute and therefore there was no justiciable case or controversy pursuant to Article III of the U.S. Constitution. The Court being without jurisdiction, they argued that the case should be dismissed.

On October 17, 1986, this Court entered an order essentially agreeing with the contentions of the defendants. The order states, [sic] inter alia:

"The record clearly establishes that the run-off election

in which plaintiffs were defeated was not mandated by Arkansas Statute Section 3-616 as plaintiffs allege, and that therefore plaintiffs have no standing to attack this particular statute as they have attempted to do in this proceeding."

Then further down in the order I quote:

"While the plaintiffs are correct in claiming that Section 3-616 does require a run-off election in certain circumstances, and that it was adopted by the General Assembly in 1983, this particular statute had nothing to do with the elections of which plaintiffs complain. Section 3-616 governs the general elections of Arkansas; it has no effect on the party primaries in which the plaintiffs participated."

And then further on in that same order we find the following quotation:

"Thus, plaintiffs' complaint is fundamentally flawed. Plaintiffs' complaint clearly rests on the existence of Section 3-616. But since plaintiffs have not suffered any harm by the workings of this statute in so much as they were defeated in

the party primary run-off, not the general election run-off prescribed in Section 3-616, plaintiffs have no standing to challenge this law."

The Court, while acknowledging the defect would warrant dismissal of the complaint, nevertheless decided to hold the matter in abeyance to permit plaintiffs to file a motion for leave to file an amended and substituted complaint. This ruling gave the plaintiffs an opportunity to move to amend and for the defendants to respond. The Court went on to say that it "will subsequently dispose with that motion along with the pending motion to dismiss."

On November 7, 1986, the plaintiffs were permitted to file and did file their Amended Complaint/Class Action. The amended complaint did challenge the primary run-off provisions of Section 3-110 but it also again attempted to challenge the general election run-off requirement of Section 3-616. Apparently the defendants did not again specifically renew their motion to dismiss with respect to Section 3-616

for lack of standing but they did assert that the amended complaint "fails to state a claim upon which relief can be granted." And the answer of the Phillips County Democratic Committee denied the jurisdiction of the Court, and denied that "plaintiffs have standing to challenge the acts and statutes challenged in said complaint." That answer also stated that "the amended complaint filed herein fails to state a claim upon which relief can be granted."

Now when I reviewed the file yesterday I noted this standing problem with respect to Section 3-616. I have read all of the pretrial submissions, including the trial briefs and the memorandum in support of and opposition to the pending motion for summary judgment and I find nothing in the plaintiffs' submissions to cause me to change the opinion which I expressed in my [suc] order of October 17, 1986, and that they have no standing to challenge Section 3-616.

Now the failure of the defendants and the Court to pick up on the standing challenge with respect to Section 3-

616 has led to an inappropriate class certification with respect to certain of the defendants. Since the plaintiffs have no standing to challenge the general election run-off statute, Section 3-616, they would also be inappropriate representatives of a class of persons wishing to challenge that statute. Of course, the plaintiffs were not certified as representatives of such a class. However, the problem arises with respect to the certification of the Phillips County Board of Election Commissioners as representative of a class of all county boards of election commissioners in the state.

The Court first notes that the Phillips County Board of Election Commissioners was not made a party in the original complaint. It was first named as a party in the amended complaint filed November 7, 1986. Paragraph 14 of the amended complaint states that the Phillips County Board of Election Commissioners "is responsible for overseeing the conduct of elections within Phillips County, Arkansas." However, the law appears [sic] to be clear that the primary

elections are not conducted by the county boards of election commissioners but, rather, by the political parties. See Ark. Stats. as more recently codified 7-7-101, et. seq. Since the Court is ruling that the plaintiff has no standing to challenge the general election run-off statute, neither the Phillips County Board of Election Commissioners individually or as a representative of other county boards of election commissioners, is an appropriate party defendant. Furthermore, the file does not reflect that the Phillips County Board of Election Commissioners was ever served, nor has it ever entered its appearance or filed any response voluntarily, so far as I could determine from a quick review of the file. Therefore, the Phillips County Board of Election Commissioners will be dismissed from this case and the class of county boards of election commissioners of which the Phillips County Board was the representative, will be de-certified.

The Court is also persuaded that the motion for

summary judgment filed by the defendants Governor Bill Clinton and Secretary of State McCuen should be granted on the ground that they are not necessary parties and that no claim of wrongdoing has appropriately been asserted against those defendants. Neither the State Board of Election Commissioners nor any of its members are named as defendants in the amended and substituted complaint. Apparently they were named in the original complaint, at least certain of the constitutional officers, some of which are members of that board of election commissioners. As pointed out by the separate defendants, if the Court were to require that the defendant political county committees certify certain candidate,s "then separate defendants Clinton and McCuen cannot exercise their legal functions in any way other than to issue commissions and certify those candidates certified to them, since, they only commission and certify candidates and results certified by local authorities." There is no basis in the alleged facts or otherwise to suggest they would not folow

their duty in conformance with the statements which they made in their motion.

Since no cause of action upon which relief could be granted in favor of plaintiffs has been propery asserted against defendants Bill Clinton and W. J. McCuen, those defendants will be dismissed from the lawsuit.

Now when the Court was dealing with the class certification issue with respect to the county committees of political parties in the State of Arkansas, it ordered that "the defendant Phillips County Democratic Committee and the Phillips County Republican Committee be and they are hereby appointed as the named representatives on behalf of the following defendants' class: all political parties' county committees in the State of Arkansas." In order to carry out this order it directed that the Phillips County Republican Committee be served and made a party for the purpose of establishing an appropriate defendant class. See order of April 13, 1987. The file reflects that the summons and

complaint was served upon the Phillips County Republican party Committee in care of Mr. Bankston Waters on May 9, 1987.

Neither the Republican party nor the Phillips County Republican Committee are named in the amended complaint. Obviously they had nothing to do with the conduct of the Democratic primary of which the plaintiffs, Sam Whitfield, Jr. and Linda Whitfield, complain. However, the Phillips County Republican Committee, just like the Phillips County Democratic Committee, is charged with the duty of conducting preferential primary and general primary elections under Arkansas law. If it should turn out that prospective and injunctive relief is found to be appropriate in connection with the primary run-off law, then both political parties would be or could be affected thereby.

The Court is further concerned about the breadth of the defendants' class certification of the Phillips County Democratic and Republican Committees as representatives of

all such committees in the State of Arkansas. It is having some second thoughts about the breadth of that order. However, it will not disturb that certification at this time.

The Court has some doubt whether a cause of action has appropriately been asserted against the Democratic party of the State of Arkansas or the Democratic Central Committee. However, no motion to dismiss has been filed with respect to those parties [sic] and it is possible that it could be useful to have them as parties if prospective injunctive relief were found to be appropriate. Therefore, it looks as the case goes to trial as if the defendants are the Democratic Part of the State of Arkansas, the Democratic State Committee and the Phillips County Democratic and Republican Committees and this emphasizes what we are about here, which is a challenge of the run-off provisions dealing with primary elections. And I am convinced that this is the full scope of the standing of the plaintiffs and the focus that should be -- which we should have during the trial.

I want to get some factual information if I can. Going back to the election in which the Whitfields ran -- that was May 27 of 1986. Is there anyone there who can tell me whether there was a Republican candidate in the 1986 general election following those primary elections? That is, in the general election in November, was there a Republican and a Democrat? And I also want to know whether anybody knows whether, in that election, there was an independent candidate. Can anybody speak to that?

MR. NEAL: I can speak to it. There was neither an independent candidate nor a Republican candidate for the office of county judge in the November election.

THE COURT: As I understand it, Mr. Neal, the law had been changed prior to that election so that the filing time for independent candidates, the deadlines, were the same as with those who wanted to run in the party primaries.

MR. NEAL: That is correct.

THE COURT: So the effect of this would have been

that had the Whitfields -- had there been no run-off in the primary, they would have been elected without opposition in November because there was no Republican running against them and there was no independent party running against them.

MR. NEAL: That's my information.

THE COURT: That, I think, emphasizes again the lack of standing with respect to the general election run-off which is contemplated by Section 3-616. So let me find out a few more things as we get further into the discussions.

MS. KARLAN: Your Honor, is it possible for us to respond at some point during this conference call to your orders?

THE COURT: Yes, you may. Perhaps what I should do is just stop now and give you a chance to comment and make your statements. Now, would you state your name, each person who talks, for the purposes of the record. Go ahead and state. Try to change my mind. Who wants to

speak?

MS. KARLAN: Pamela Karlan. I'm one of the attorneys for the plaintiff.

THE COURT: Go right ahead.

MS. KARLAN: With regard to Your Honor's ruling on standing, the standing of the plaintiffs here is not being brought in their capacity as candidates for election at any particular election; rather their standing rests on the fact that they are registered voters in Phillips County and in the State of Arkansas. The practices that they are challenging -- this is not a challenge to the particular result of any election. We are not seeking to have the 1986 election overturned or any other particular election results. Rather, this case represents a structural challenge to particular structural features of the election law in Arkansas; and the fact that no particular black candidates have lost any election as a result of the general run-off law is not in itself a barrier to standing.

With regard to that, I simply refer Your Honor to

page 28 of the Senate Report, Senate Report 97-417 in 1982 which the Supreme Court has interpreted as an authoritative guideline for interpreting Section 2 cases. In the middle of that page the Senate Report states that Section 2 protects the right of minority voters to be free from election practices, procedures, or methods that deny them the same opportunity to participate in the political process as other citizens enjoy. The standing of the plaintiffs here, therefore, rests on their status as voters; not in their status as candidates.

In that regard I think there need not have been a black candidate already who has lost an election because of a particular practice for there to be standing. The Supreme Court held that in Thornburg against Gingles -- the citation which is 92 Lawyer [sic] Edition 25, 1986. In addition, several lower courts have since then found standing for plaintiffs and in some cases found liability despite the fact that no black candidates have run.

With regard to that, Your Honor, I refer you first to

Martin against Allain, 658 F.Supp. 1183, a case from the Southern District of Mississippi in 1987 and Chisom against Edwards, a case decided yesterday by the Fifth Circuit challenging the use of multi-member districts for the Louisiana Supreme Court, even though no black candidate had run, and challenging the standing of plaintiffs in that case to challenge the electoral mechanism. The Supreme Court found they had stated a claim and were entitled to provide the evidence at trial to show that results had been violated.

THE COURT: Well, you know, I'm going to look at those two cases. The last one is the Chisom case, and it was decided yesterday?

MS. [sic] KARLAN: Yes, Your Honor.

THE COURT: And it's the Fifth Circuit?

MS. KARLAN: Yes.

THE COURT: We can get it on the facsimile machine.

But my view of standing makes really the Senate

statement perhaps irrelevant. There's been no [sic] showing that the run-off provision of general elections has harmed the blacks or any other plaintiffs, and all you could be showing, I think, is that it could possibly harm them. You would deprive the Court of any particularized investigation of the consequence of the statute in terms of the actual circumstances pertaining in the county in connection with general elections. We would be dealing with an abstract, theoretical question. We would not be dealing with a concrete circumstance.

Now, I'm going to review those to see if they cause me to change my mind. But I don't believe they do. I think the opinion I first expressed is correct back when the original motion to dismiss was filed. I also think it really runs contrary to the theory of Section 2 of the Voting Rights Act that you would deal with these issues abstractly on the basis of potentials without any actual showing of harm. I say this particularly because reading all these cases has led me to

believe that the particular local circumstances can have a dramatic -- can dramatically change the results in terms of whether run-off is good or bad for minorities. It cannot be dealt with, as I see it, in sort of an abstract question. At least that's my view. I might change my mind after reading the cases, and I certainly will.

Do you have anything [sic] else to say in connection with the standing problem?

MS. KARLAN: Yes, Your Honor. In addition to the plaintiffs' results claim under Section 2 with regard to now what's Section 7-5-106, we are also challenging the general election run-off statute on the grounds that it was adopted with a discriminatory intent in that it was designed and was motivated in part by a desire to dilute black voting strength.

Now with respect to that claim, there is some division as to precisely the level the plaintiffs must show, but it's clear it need not rise to the level of effect that need be shown under the results test. With respect to that, Your Honor, I think

that the plaintiff has standing to challenge a law that was adopted with a discriminatory intent before they go through the futile effort of running candidates in a race which the candidates are, by the structural nature of the provision, doomed to lose.

THE COURT: Well, I think your second statement is the more correct one. I don't believe that you are correct when you assert that as maybe one or two cases of that proving discriminatory intent in the enactment is all you have to prove. I think it's -- certainly if you have some discriminatory effect, then, you know, you don't need to prove nearly as much discriminatory intent. I agree on that proposition, but I don't believe you can simply attack a statute as soon as its passed by the legislature on that ground without having some basis for showing its application in some concrete contention in which a person is harmed by the statute.

So, in other words, the concepts of standing, I think,

are what we are really in disagreement about. It requires a concrete case in controversy and not just an abstract question that something -- that a run-off provision could possibly harm you.

MS. KARLAN: I understand, you know, that Article III prohibits advisory opinions, but I think the footnote in Gingles regarding how you would go about, for example, showing racial polarization if the minority [sic] has not sponsored any candidates since a particular practice was instituted shows that the Supreme Court at least does not view the fact that there is not a particular election result being challenged to preclude its access to lawsuit.

THE COURT: I guess what you could do here -- I don't know how many other run-off statutes there are in Arkansas, but I guess there are probably several. I'm not sure. Are there? Are there other run-off statutes that you are familiar with in Arkansas?

MS. KARLAN: No, Your Honor. I believe that the

two statutes are the primary election statutes, which was 3-110(a) at the time the lawsuit was filed and the municipal and county office statute, which was 3-616 at the time the lawsuit was filed. I'm not aware of any other run-off statutes.

THE COURT: Well, you know, I'm going to stand by my ruling until I convince myself that I'm wrong. I'm going to read the cases and review the points that you have made and we'll shortly get back with you. If I change my mind, I will be telling you tomorrow, getting word to you through my law clerk at least.

MS. KARLAN: Your Honor, just one more thing on this aspect of the case. If Your Honor decides that there is no standing with regard to the general election run-off statute, I think for purposes of this case it would make a great deal of sense, both to get a written opinion and perhaps to have a final appealable order entered on it so the case isn't tried piece-meal, assuming that eventually we are able to show that we have standing to challenge both the general election and

the primary run-off statutes.

THE COURT: Well, this order and my discussion of it is on the record and an order itself will be entered if I stay with this position dismissing the attack or the challenge to the general run-off provision and so the record will be complete.

As far as if the idea is that you want to appeal that before you try the case, you know, it's so different a situation -- that is, the general election from the primary, as I see it -- that there is no reason not to go ahead and try the attack on the primary law even if you reverse me on the other, in other words, and have to come back and try the general. They are just two separate and different animals, as I see it, and I don't know of any harm that would come from trying them separate. But in any even, we are going to be entering an order pursuant to this after I convince myself I'm right, if you don't change my mind, and there it will be. You can either move for a continuance or move to appeal and go through all that if you want to; but my general inclination is

to proceed with the trial of the real conflict presented by the Whitfields when they filed the complaint, which is an attack on the primary run-off, which is entirely different, as I analyze it, from run-offs in general elections which also may be challenged to have different factors at work and are really different at, as I see it.

In any event, you will have a formal ruling and I might supplement it with some analysis of the cases, but at this you have what I have said on the record and that's all you really need if I don't say anymore. There will be an order entered probably tomorrow making the ruling explicit.

STATUTES IN ISSUE

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Ark. Stat. Ann. § 7-5-106 provides, in pertinent part:

> (a) Whenever there are more than two (2) candidates for election to any county elected office, including the office of justice of the peace, or for any municipal office at any general election held in this state, and no candidate for the municipal or county office receives a majority of the votes cast for the office, there shall be a runoff general election held in that county or municipality two (2) weeks following the date of the general election at which the names of the two (2) candidates receiving the highest number of votes, but not a majority, shall be placed on the ballot to be voted upon by the qualified electors of the county or the municipality, as the case may be. The person receiving the majority of the votes cats for the office at the runoff general election shall be declared elected.

Ark. Stat. Ann. § 7-7-102:

> (a) Nominees of any political party for United States Senate, United States House of Representatives, state, district, or county office to be voted upon at a general elected shall be certified as having received a majority of the votes cast for the office, or as an unopposed candidate, at a primary election held by the political party in the manner provided by law.
>
> (b) Nominees of any political party for township or municipal office shall be declared

by certification of a primary election as provided in subsection (a) of this section.

Ark. Stat. Ann. § 7-7-202 provides, in pertinent part:

> (a) Whenever any political party shall, by primary election, select party nominees as candidates at any general election for any United States, state, district, county, township, or municipal office, the party shall hold a preferential primary election and a general primary election . . . .
>
> (b) A general primary election shall not be held if there are no races where three (3) or more candidates qualify for the same office or position as provided in subsection (c) of this section, unless a general primary election is necessary to break a tie votre for the same office or position at the preferential primary.
>
> (c) If there are no races where three (3) or more candidates qualify for the same office or position, only the preferential primary election shall be held.